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The *California Regulatory Notice Register* is an official state publication of the Office of Administrative Law containing notices of proposed regulatory actions by state regulatory agencies to adopt, amend or repeal regulations contained in the California Code of Regulations. The effective period of a notice of proposed regulatory action by a state agency in the *California Regulatory Notice Register* shall not exceed one year [Government Code § 11346.4(b)]. It is suggested, therefore, that issues of the *California Regulatory Notice Register* be retained for a minimum of 18 months.

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PROPOSED ACTION ON REGULATIONS

Information contained in this document is published as received from agencies and is not edited by the Office of State Publishing.

TITLE 14. FISH AND GAME COMMISSION

NOTICE OF PROPOSED CHANGES IN REGULATIONS

NOTICE IS HEREBY GIVEN that the Fish and Game Commission, pursuant to the authority vested by sections 200, 202, 205, 219, 220 and 7708, of the Fish and Game Code and to implement, interpret or make specific sections 200, 202, 205, 210, 220, 7155, 7700, 7702, 7703, 7706, 7708 and 12300 of said Code, proposes to amend Section 5.86, which is being renumbered as Section 8.20, Title 14, California Code of Regulations, regarding permits for ceremonial Indian fishing.

INFORMATIVE DIGEST/POLICY STATEMENT OVERVIEW

The Department is recommending adoption of a new regulation authorizing the Department to issue permits (Permit to Take Fall-run Chinook Salmon in the Feather River Using Traditional Fishing Equipment and Methods of the Maidu Indian Tribe: Form FG 710 (4/01) which will be incorporated by reference) to members of a Maidu Indian Tribe, allowing the take of fish from the Feather River, for religious or cultural purposes, using traditional tribal fishing equipment and methods. The permits shall include any restrictions necessary to prevent damage to aquatic resources and to protect threatened or endangered species. Specific allowances and restrictions in the permits may allow fishing using methods not allowed by sport fishing regulations. All other fishing restrictions found in Chapters 1–3, Title 14, CCR (Inland Sport Fishing Regulations) would continue to apply.

The Department is recommending that the above provision be added to an existing regulation, Section 5.86, Title 14, CCR, which will be renumbered as Section 8.20. Section 5.86 currently is designed to clarify that under certain conditions, federal regulations exempt California Indians from the salmon possession limits specified in the sport fishing regulations for the Klamath River. This section now appears in Chapter 2, Article 4, Species Regulations (an inappropriate title). Therefore, in addition to

broadening this section to include the new permit authorization for fishing in the Feather River, the Department is recommending that it be relocated in another article, under a title more consistent with the content of the regulation.

The Department is recommending additional amendments to eliminate provisions restricting the handling and disposition of the Indian catch (fish marking requirements, prohibition against the sale of Indian-caught fish, and a requirement for proof of tribal membership). These provisions have been made obsolete by agreements or federal court decisions, and they are no longer applicable.

NOTICE IS ALSO GIVEN that any person interested may present statements, orally or in writing, relevant to this action at a hearing to be held at the Hilton, 1000 Aguajito Road, Monterey, Ca, on Friday, April 6, 2001 at 8:30 a.m., or as soon thereafter as the matter may be heard. It is requested, but not required, that written comments be submitted on or before March 30, 2001, at the address given below, or by fax at (916) 653-5040, or by e-mail to jduffy@dfg.ca.gov, but comments must be received no later than April 6, 2001, at the hearing in Monterey, CA. E-mail comments must include the true name and mailing address of the commentator.

The regulations as proposed in ~~strikeout~~-underline format, as well as an initial statement of reasons, including environmental considerations and all information upon which the proposal is based (rulemaking file), are on file and available for public review from the agency representative, John M. Duffy, Assistant Executive Director, Fish and Game Commission, 1416 Ninth Street, Box 944209, Sacramento, California 94244- 2090, phone (916) 653-4899. Please direct inquiries to John M. Duffy or Tracy L. Reed at the preceding address or phone number. Steve Taylor, Inland Fisheries Branch, Department of Fish and Game, phone (916) 653-8262, has been designated to respond to questions on the substance of the proposed regulations. Copies of the initial statement of reasons, including the regulatory language, may be obtained from the address above.

AVAILABILITY OF MODIFIED TEXT

If the regulations adopted by the Commission differ from but are sufficiently related to the action proposed, they will be available to the public for at least 15 days prior to the date of adoption. Circumstances beyond the control of the Commission (e.g., timing of Federal regulation adoption, timing of resource data collection, timelines do not allow, etc.) or changes made to be responsive to public recommendation and comments during the regulatory process may preclude full compliance with the 15-day comment period, and the Commission will exercise its powers under Section

202 of the Fish and Game Code. Regulations adopted pursuant to this section are not subject to the time periods for adoption, amendment or repeal of regulations prescribed in Sections 11343.4, 11346.4 and 11346.8 of the Government Code. Any person interested may obtain a copy of said regulations prior to the date of adoption by contacting the agency representative named herein.

If the regulatory proposal is adopted, the final statement of reasons may be obtained from the address above when it has been received from agency program staff.

IMPACT OF REGULATORY ACTION

The potential for significant statewide adverse economic impacts that might result from the proposed regulatory action has been assessed, and the following initial determinations relative to the required statutory categories have been made:

- (a) Significant Statewide Adverse Economic Impact Directly Affecting Business, including the Ability of California Businesses to Compete with Businesses in Other States:

The proposed action will not have a significant statewide adverse economic impact directly affecting businesses, including the ability of California businesses to compete with businesses in other states. The proposed change will impose no new restrictions on human activities; therefore it will have no effect on resources or spending patterns.

- (b) Impact on the Creation or Elimination of Jobs within the State, the Creation of New Businesses or the Elimination of Existing Businesses, or the Expansion of Businesses in California: None.
- (c) Cost Impacts on a Representative Private Person or Business:

The agency is not aware of any cost impacts that a representative private person or business would necessarily incur in reasonable compliance with the proposed action.

- (d) Costs or Savings to State Agencies or Costs/Savings in Federal funding to the State: None.
- (e) Nondiscretionary Costs/Savings to Local Agencies: None.
- (f) Programs Mandated on Local Agencies or School Districts: None.
- (g) Costs Imposed on any Local Agency or School District that is Required to be Reimbursed Under Part 7 (commencing with Section 17500) of Division 4: None.
- (h) Effect on Housing Costs: None.

EFFECT ON SMALL BUSINESS

It has been determined that the adoption of these regulations may affect small business.

CONSIDERATION OF ALTERNATIVES

The agency must determine that no reasonable alternative considered by the agency, or that has otherwise been identified and brought to the attention of the agency, would be more effective in carrying out the purpose for which the action is proposed or would be as effective and less burdensome to affected private persons than the proposed action.

TITLE 14. FISH AND GAME COMMISSION

Notice of Proposed Changes in Regulations

NOTICE IS HEREBY GIVEN that the Fish and Game Commission, pursuant to the authority vested by sections 710.7, 711, 8591 and 8842 of the Fish and Game Code and to implement, interpret or make specific sections 710.7, 711, 8140, 8590, 8591, 8593, 8594, 8595, 8842, 9000, 9001, 9004-9008 and 9015 of said Code, proposes to amend sections 120.3, 120.4, 180.1 and 180.3, Title 14, California Code of Regulations, regarding commercial prawn regulations.

INFORMATIVE DIGEST/POLICY STATEMENT OVERVIEW

Under existing regulations (Sections 120, 120.3, 180, and 180.1, Title 14 CCR) spot prawns may be taken commercially with a general prawn trawl permit, which also allows the harvest of golden and ridgeback prawns, or with a general trap permit, which also allows the harvest of fish, mollusks, and other crustaceans (except Dungeness crab and lobster). At present, no specific permit exists for the harvest of spot prawns. The proposed regulations would create new requirements for participation in the spot prawn trawl and trap fisheries. A permit, in the form of a separate \$75.00 spot prawn trawl stamp, would be required in addition to the general prawn trawl permit for any vessel landing spot prawns taken by trawl after May 31, 2001. A permit, in the form of a separate \$75.00 spot prawn trap stamp, would be required in addition to the general trap permit for any vessel landing spot prawns taken by trap after May 31, 2001. The proposed regulations would require proof of landing spot prawns taken by trawl or trap on or before February 3, 2001 in order to obtain a spot prawn trawl or trap stamp, respectively.

Sections 120.4 and 180.3, Title 14, CCR, establish a control date of January 1, 1999 for the spot prawn trap and trawl commercial fisheries. The primary purpose of the control date was to prevent fishing vessels, which had not fished spot prawns prior to this date,

from qualifying for restricted access spot prawn fishery programs when they are implemented. However, new vessels have continued to enter the fishery since January 1, 1999. As an interim measure, the proposed regulations would establish a moratorium, with a corresponding control date of February 3, 2001 (the date of the notice hearing), on the issuance of spot prawn trawl and trap stamps to vessels not showing proof of landing spot prawns prior to this date. The moratorium on the issuance of new permits would remain in effect until such time as restricted access programs are implemented for the trap and trawl spot prawn fisheries.

Vessels qualifying for the new spot prawn trawl or trap stamp which have not made landings of spot prawns prior to January 1, 1999 would be allowed to participate in the fishery until restricted access programs are implemented. However, these vessels would not qualify for the restricted access fisheries.

The proposed regulations would delete subsections which required the payment of a spot prawn observer fee. The fee was required for the period July 14, 2000 to March 31, 2001 and will become inoperative as of April 1, 2001.

NOTICE IS ALSO GIVEN that any person interested may present statements, orally or in writing, relevant to this action at a hearing to be held at the Hilton, 1000 Aguajito Road, Monterey, Ca, on Friday, April 6, 2001 at 8:30 a.m., or as soon thereafter as the matter may be heard. It is requested, but not required, that written comments be submitted on or before March 30, 2001 at the address given below, or by fax at (916) 653-5040, or by e-mail to jduffy@dfg.ca.gov, but must be received no later than April 6, 2001, at the hearing in Monterey, CA. E-mail comments must include the true name and mailing address of the commentor.

The regulations as proposed in ~~strikeout~~-underline format, as well as an initial statement of reasons, including environmental considerations and all information upon which the proposal is based (rulemaking file), are on file and available for public review from the agency representative, John M. Duffy, Assistant Executive Director, Fish and Game Commission, 1416 Ninth Street, Box 944209, Sacramento, California 94244-2090, phone (916) 653-4899. Please direct inquiries to John M. Duffy or Kathy Maxwell at the preceding address or phone number. Paul Reilly, Marine Region, Department of Fish and Game, phone (831) 649-2879 has been designated to respond to questions on the substance of the proposed regulations. Copies of the initial statement of reasons, including the regulatory language, may be obtained from the address above.

AVAILABILITY OF MODIFIED TEXT

If the regulations adopted by the Commission differ from but are sufficiently related to the action proposed, they will be available to the public for at least 15 days prior to the date of adoption. Any person interested may obtain a copy of said regulations prior to the date of adoption by contacting the agency representative named herein.

If the regulatory proposal is adopted, the final statement of reasons may be obtained from the address above when it has been received from agency program staff.

IMPACT OF REGULATORY ACTION

The potential for significant statewide adverse economic impacts that might result from the proposed regulatory action has been assessed, and the following initial determinations relative to the required statutory categories have been made:

- (a) Significant Statewide Adverse Economic Impact Directly Affecting Business, including the Ability of California Businesses to Compete with Businesses in Other States:

The proposed action will not have a significant statewide adverse economic impact directly affecting business, including the ability of California businesses to compete with businesses in other states. The proposed action only will prevent additional vessels from entering the fishery and will not necessarily reduce the number of vessels currently in the fishery.

- (b) Impact on the Creation or Elimination of Jobs within the State, the Creation of New Businesses or the Elimination of Existing Businesses, or the Expansion of Businesses in California: None.
- (c) Cost Impacts on a Representative Private Person or Business:

The agency is not aware of any cost impacts that a representative private person would necessarily incur in reasonable compliance with the proposed action. A business would incur an additional \$75 spot prawn stamp fee.

- (d) Costs or Savings to State agencies or Costs/Savings in Federal funding to the State: None.
- (e) Nondiscretionary Costs/Savings to Local Agencies: None.
- (f) Programs mandated on Local Agencies or School Districts: None.

- (g) Costs Imposed on any Local Agency or School District that is Required to be Reimbursed Under Part 7 (commencing with Section 17500) of Division 4: None.
- (h) Effect on Housing Costs: None.

EFFECT ON SMALL BUSINESS

It has been determined that the adoption of these regulations may affect small business.

CONSIDERATION OF ALTERNATIVES

The agency must determine that no reasonable alternative considered by the agency, or that has otherwise been identified and brought to the attention of the agency, would be more effective in carrying out the purpose for which the action is proposed or would be as effective and less burdensome to affected private persons than the proposed action.

TITLE 14. FISH AND GAME COMMISSION

NOTICE OF PROPOSED CHANGES IN REGULATIONS

NOTICE IS HEREBY GIVEN that the Fish and Game Commission, pursuant to the authority vested by sections 6653, 6653.5 and 6700 of the Fish and Game Code and to implement, interpret or make specific sections 6650–6680 and 6700–6707 of said Code, proposes to amend sections 165 and 165.5, Title 14, California Code of Regulations (CCR), regarding harvesting of kelp and other aquatic plants.

INFORMATIVE DIGEST/POLICY STATEMENT OVERVIEW

Under existing regulations (Sections 165 and 165.5, Title 14, CCR) giant kelp and bull kelp may be taken for commercial purposes under a license or lease, subject to such regulations as the Fish and Game Commission shall prescribe. Current regulations in Section 165 specify: a license application process, a license fee requirement, and a royalty fee requirement for the commercial harvesting of kelp and other aquatic plants. The regulations also specify reporting of harvest requirements, establish geographical limitations on kelp harvesting, establish limitations on kelp harvesting methods, and prohibit the disturbance of certain aquatic plants. Current regulations in Section 165.5 specify: an application filing and fee requirement, and a royalty fee requirement for the exclusive privilege of harvesting kelp within leased beds. Section 165.5 also establishes lease term and renewal requirements, and identifies the kelp beds that are not available for leasing.

The proposed regulation changes recommend clarification of the general license or lease provisions and

general harvest provisions. In addition, other changes relating to gear restrictions, seasons, development of harvest plans, area closures, changes in kelp bed designations, and harvest limitations are recommended to improve or provide for the efficient harvest and orderly conduct of commercial kelp harvesting. The following is a summary of the changes proposed for Section 165 and 165.5, Title 14, CCR:

- clarify that direct weighing or a volume conversion that has been accepted by the Department are the only approved methods for weighing harvested kelp;
- repeal requirement for information not used by the Department in required reporting of harvest;
- expand the area restriction on use of mechanical harvester to take bull kelp in open beds from Point Montera, San Mateo County to Santa Rosa Creek, San Luis Obispo County;
- add a seasonal closure (April 1 through July 31) for harvesting bull kelp from open beds that lie partially or totally within the boundary of the Monterey Bay National Marine Sanctuary;
- require kelp harvesters to possess a Commission approved harvest plan before mechanical harvesters can be used to harvest giant kelp in the area north of Santa Rosa Creek, San Luis Obispo County;
- close that portion of open kelp bed 220 to kelp harvesting that lies between the terminus of the Monterey Breakwater and a line extending seaward from Drakes Avenue (approximately 0.5 miles of coastline);
- specify the means by which the Commission may designate a nonleased kelp bed or portion of bed as a harvest control area for a specified period of time wherein individual harvesters will be subject to a cumulative harvest tonnage limit;
- expand the number of kelp beds that are closed to harvest by adding 13 kelp beds distributed throughout the state that have historically had only small kelp canopies (less than 0.05 square miles) and removing those same beds from other designations (open or leasable);
- provide contact information so interested individuals can easily determine which beds are currently available for leasing.

Editorial changes are also proposed to improve the clarity and consistency of the regulations and to update Department of Fish and Game addresses.

NOTICE IS ALSO GIVEN that any person interested may present statements, orally or in writing, relevant to this action at a hearing to be held at The Hilton, 1000 Aguajito Road, Monterey, CA, on Friday,

April 6, 2001, at 8:30 a.m., or as soon thereafter as the matter may be heard. It is requested, but not required, that written comments be submitted on or before Friday, March 30, 2001, at the address given below, or by fax at (916) 653-5040, or by e-mail to jduffy@dfg.ca.gov, but comments must be received no later than April 6, 2001, at the hearing in Monterey, CA. E-mail comments must include the true name and mailing address of the commentor.

The regulations as proposed in strikeout-underline format, as well as an initial statement of reasons, including environmental considerations and all information upon which the proposal is based (rulemaking file), are on file and available for public review from the agency representative, John M. Duffy, Assistant Executive Director, Fish and Game Commission, 1416 Ninth Street, Box 944209, Sacramento, California 94244-2090, phone (916) 653-4899. Please direct inquiries to John M. Duffy or Kathy Maxwell at the preceding address or phone number. Fred Wendell, Marine Resources Region, Department of Fish and Game, phone (805) 772-1714, has been designated to respond to questions on the substance of the proposed regulations. Copies of the initial statement of reasons, including the regulatory language, may be obtained from the address above.

AVAILABILITY OF MODIFIED TEXT

If the regulations adopted by the Commission differ from but are sufficiently related to the action proposed, they will be available to the public for at least 15 days prior to the date of adoption. Any person interested may obtain a copy of said regulations prior to the date of adoption by contacting the agency representative named herein.

If the regulatory proposal is adopted, the final statement of reasons may be obtained from the address above when it has been received from agency program staff.

ECONOMIC IMPACT

The agency has assessed the potential for significant statewide adverse economic impact on business or private persons that might result from the proposed regulatory action, and it has made the following initial determinations relative to the required statutory categories:

- (a) Significant Statewide Adverse Economic Impact Directly Affecting Business, including the Ability of California Businesses to Compete with Businesses in Other States:

The proposed action will not have a significant statewide adverse economic impact affecting business, including the ability of California businesses to compete with businesses in other states. The proposed area closures are small and

help remains widely available for commercial harvest. The differences in cost associated with accessing open kelp beds in the vicinity of the suggested closures will be minimal because the closures are small. If not reduced by accessing open beds closer to the port of origin, costs will be well within the range of costs typically incurred during harvest operations and economically neutral to business.

- (b) Impact on the Creation or Elimination of Jobs within the State, the Creation of New Businesses or the Elimination of Existing Businesses, or the Expansion of Businesses in California: None.
- (c) Cost Impacts on a Representative Private Person or Business:
The agency is not aware of any cost impacts that a representative private person or business would necessarily incur in reasonable compliance with the proposed action.
- (d) Costs or Savings to State agencies or Costs/Savings in Federal funding to the State: None.
- (e) Nondiscretionary Costs/Savings to Local Agencies: None.
- (f) Programs mandated on Local Agencies or School Districts: None.
- (g) Costs Imposed on any Local Agency or School District that is Required to be Reimbursed Under Part 7 (commencing with Section 17500) of Division 4: None.
- (h) Effect on Housing Costs: None.

EFFECT ON SMALL BUSINESS

It has been determined that the adoption of these regulations may affect small business.

CONSIDERATION OF ALTERNATIVES

The agency must determine that no reasonable alternative considered by the agency, or that has otherwise been identified and brought to the attention of the agency, would be more effective in carrying out the purpose for which the action is proposed or would be as effective and less burdensome to affected private persons than the proposed action.

TITLE 14. FISH AND GAME COMMISSION

Notice of Proposed Changes in Regulations

NOTICE IS HEREBY GIVEN that the Fish and Game Commission, pursuant to the authority vested by sections 200, 202, 205, 215, 220, 240 and 315 of the Fish and Game Code and to implement, interpret

or make specific sections 200, 205, 206 and 215 of said Code, proposes to amend subsection (b)(91.1) of Section 7.50, Title 14, California Code of Regulations, re: Klamath River Sport Fishing regulations.

INFORMATIVE DIGEST/POLICY STATEMENT OVERVIEW

Quota Adjustment: Under current regulations, the allowable chinook salmon harvest in the Klamath River system is based on spawning run size predictions and spawning escapement goals. The harvest and the distribution of the catch are regulated by seasons, daily and weekly bag and possession limits, and area quotas and allocations.

The allowable catch each year is based on recommendations of the Pacific Fishery Management Council (PFMC), which meets annually to provide these recommendations.

The total river system recreational harvest of fall chinook salmon is currently regulated by a quota. In 2000, the share, or quota for the Klamath River basin allowable sport catch, was 4,200 adult fish (15 percent of the total allowable harvest by non-tribal fisheries, including ocean commercial, ocean recreational and recreational river fisheries).

Projections of the abundance of adult Klamath River fall-run chinook salmon in the 2001 season are not yet available from the PFMC. However, preliminary examination of data available to Department staff suggests that the predicted 2001 adult salmon run will be similar in size to the 2000 run. Consequently, the Department is suggesting that the Commission consider a 2001 quota for the river recreational fishery similar to that of last year, and for notice requirements, within a range from half to twice the 2000 quota (2100–8400 adult salmon). The Commission will consider modifying the share of the allowable catch allocated to the river recreational fishery (which was 15 percent in 2000). Any adjustment of this share will be included in the 2100–8400 range of the quota. As in prior years, the quota would be split evenly between fisheries above and below Coon Creek Falls.

Date Change for the Fishing Closure in the Area from the Highway 299 West Bridge at Cedar Flat downstream to Hawkins Bar Bridge (Road to Denny): Current regulations (subsection (b)(91.1)(A)5.) prohibit all fishing in the Trinity River from the Highway 299 West bridge at Cedar Flat downstream to the Hawkins Bar Bridge (Road to Denny) from September 1 through November 15. This closure was designed to protect migrating adult fall chinook salmon which, because of an impediment to their upstream migration in this area, are excessively vulnerable to illegal take while they are in this area. The closure does not cover the entire time period that fall-run chinook salmon are found in this area (they are

normally found in the area through the end of November). The Department, therefore, is proposing that the closure be extended through November 30. The change will also simplify the regulations by making this closure date consistent with the dates for quota-related adult salmon restrictions in the rest of the river.

Closures to Modify Allocation: Resort owners and operators in the lower Klamath River area have testified that having the adult fall-run salmon open fishing season continue through Labor Day (the first Monday in September) is critical to their economic survival. In some recent past years, the catch in the lower river, especially in the high-impact area near the mouth, has been so high that the quota was reached well before that time. To help moderate the lower river catch and extend the season, current regulations (subsection (b)(91.1)(C) 3. of Section 7.50) provide that during the period from August 1 through November 30, fishing is allowed in the Klamath River within 100 yards of the channel flowing through the spit formed at the mouth until the Department determines that 15 percent of the Klamath River basin impact quota has been taken in the Klamath River below the Highway 101 bridge. After this determination, all fishing in the small spit area near the mouth is prohibited through November 30.

Unfortunately, in 2000, the quota for the lower river was reached on September 2, the Saturday before Labor Day, and fishing for adult salmon was prohibited the last two days of Labor Day weekend. This caused great dissatisfaction among many local business people and anglers. The Department, therefore, is recommending that the Commission anticipate and consider public recommendations to further moderate the catch in the lower river. These recommendations may include modification of the temporary closure in (subsection (b)(91.1)(C) 3. of Section 7.50), recommendations for a temporary fishing closure below Coon Creek Falls, or perhaps other measures designed to guarantee an open season during the Labor Day weekend.

The Department also is proposing to reorganize and rewrite the regulatory language of subsection (b)(91.1) of Section 7.50 to shorten and simplify it.

NOTICE IS GIVEN that any person interested may present statements, orally or in writing, relevant to this action at a hearing to be held in The Hilton, 1000 Aguajito Road, Monterey, Ca, on Friday, April 6, 2001, at 8:30 a.m., or as soon thereafter as the matter may be heard. It is requested, but not required, that written comments be submitted on or before March 30, 2001, at the address given below, or by fax at (916) 653-5040, or by e-mail to jduffy@dfg.ca.gov, but must be received no later than April 6, 2001, at the

hearing in Monterey, CA. E-mail comments must include the true name and mailing address of the commentor.

The regulations as proposed in ~~strikeout~~-underline format, as well as an initial statement of reasons, including environmental considerations and all information upon which the proposal is based (rulemaking file), are on file and available for public review from the agency representative, John M. Duffy, Assistant Executive Director, Fish and Game Commission, 1416 Ninth Street, Box 944209, Sacramento, California 94244-2090, phone (916) 653-4899. Please direct inquiries to John M. Duffy or Tracy L. Reed at the preceding address or phone number. Steve Taylor, Inland Fisheries Branch, Department of Fish and Game, phone (916) 653-8262, has been designated to respond to questions on the substance of the proposed regulations. Copies of the initial statement of reasons, including the regulatory language, may be obtained from the address above.

AVAILABILITY OF MODIFIED TEXT

If the regulations adopted by the Commission differ from but are sufficiently related to the action proposed, they will be available to the public for at least 15 days prior to the date of adoption. Circumstances beyond the control of the Commission (e.g., timing of Federal regulation adoption, timing of resource data collection, timelines do not allow, etc.) or changes made to be responsive to public recommendation and comments during the regulatory process may preclude full compliance with the 15-day comment period, and the Commission will exercise its powers under Section 202 of the Fish and Game Code. Regulations adopted pursuant to this section are not subject to the time periods for adoption, amendment or repeal of regulations prescribed in Sections 11343.4, 11346.4 and 11346.8 of the Government Code. Any person interested may obtain a copy of said regulations prior to the date of adoption by contacting the agency representative named herein.

If the regulatory proposal is adopted, the final statement of reasons may be obtained from the address above when it has been received from agency program staff.

IMPACT OF REGULATORY ACTION

The potential for significant statewide adverse economic impacts that might result from the proposed regulatory action has been assessed, and the following initial determinations relative to the required statutory categories have been made:

- (a) Significant Statewide Adverse Economic Impact Directly Affecting Business, including the Ability of California Businesses to Compete with Busi-

nesses in Other States: The proposed action will not have a significant statewide adverse economic impact directly affecting businesses, including the ability of California businesses to compete with businesses in other states. The preservation of Klamath River salmon stocks is necessary for the success of lower Klamath River businesses which provide goods and services related to fishing. The proposed changes are necessary for the continued preservation of the resource and therefore the prevention of adverse economic impacts.

- (b) Impact on the Creation or Elimination of Jobs within the State, the Creation of New Businesses or the Elimination of Existing Businesses, or the Expansion of Businesses in California: None.
- (c) Cost Impact on Private Persons: The agency is not aware of any cost impacts that a representative private person would necessarily incur in reasonable compliance with the proposed action.
- (d) Costs or Savings to State Agencies or Costs/Savings in Federal funding to the State: None.
- (e) Nondiscretionary Costs/Savings to Local Agencies: None.
- (f) Programs Mandated on Local Agencies or School Districts: None.
- (g) Costs Imposed on any Local Agency or School District that is Required to be Reimbursed Under Part 7 (commencing with Section 17500) of Division 4: None.
- (h) Effect on Housing Costs: None.

EFFECT ON SMALL BUSINESS

It has been determined that the adoption of these regulations may affect small business.

CONSIDERATION OF ALTERNATIVES

The agency must determine that no reasonable alternative considered by the agency, or that has otherwise been identified and brought to the attention of the agency, would be more effective in carrying out the purpose for which the action is proposed or would be as effective and less burdensome to affected private persons than the proposed action.

TITLE 14. FISH AND GAME COMMISSION

Notice of Proposed Changes in Regulations

NOTICE IS HEREBY GIVEN that the Fish and Game Commission, pursuant to the authority vested by sections 200, 202, 203, 219, 220, 331, 332, 460,

1050, 1572, 3003.1, 3452, 3453, 4181, 4334, 4370, 4902 and 10502 of the Fish and Game Code and to implement, interpret or make specific sections 200, 202, 203, 203.1, 207, 331, 332, 458, 459, 460, 713, 1050, 1570-1572, 3003.1, 3452, 3453, 3950, 3951, 4181, 4334, 4370, 4902, 10500 and 10502 of said Code, proposes to amend sections 360, 361, 362, 363, 364 and 401, Title 14, California Code of Regulations, to make tag quota changes, clarifications, and urgency changes for the 2001-02 Mammal Hunting and Trapping Regulations.

Pursuant to the provisions of sections 203 and 203.1 of the Fish and Game Code, the Fish and Game Commission will consider populations, habitat, food supplies, the welfare of individual animals, and other pertinent facts and testimony in adopting season, bag and possession limits, and areas of take, and prescribe the manner and means of taking as part of the 2001-02 Mammal Hunting and Trapping Regulations.

INFORMATIVE DIGEST/POLICY STATEMENT OVERVIEW

Subsection 360(a). Deer: A, B, C, and D Zone Hunts

Existing regulations provide for the number of license tags available for the A, B, C, and D zones. The proposal changes the number of tags for all existing zones to a series of ranges. These ranges are necessary, as the final number of tags cannot be determined until spring herd data are collected in March/April. Because severe winter conditions can have an adverse effect on herd recruitment and overwinter adult survival, final tag quotas may fall below the proposed range.

<i>Number of Tags</i>		
<i>Zone</i>	<i>Current</i>	<i>Proposed</i>
A	65,000	30,000-65,000
B	55,500	35,000-65,500
C	12,000	5,000-25,000
D-3-5	33,000	30,000-40,000
D-6	10,000	6,000-16,000
D-7	9,000	4,000-10,000
D-8	8,000	3,000-10,000
D-9	2,000	1,000-2,500
D-10	700	400-800
D-11	5,500	2,500-6,000
D-12	950	100-1,500
D-13	4,000	2,000-4,000
D-14	3,000	2,000-3,500
D-15	1,500	500-1,500
D-16	3,000	1,000-3,500
D-17	500	100-800
D-19	1,500	500-1,500

Subsection 360(b). Deer: X-Zone Hunts

Existing regulations provide for the number of hunting tags for the X zones. The proposal changes the number of tags for all existing zones to a series of

ranges. These ranges are necessary, as the final number of tags cannot be determined until spring herd data are collected in March/April. Because severe winter conditions can have an adverse effect on herd recruitment and overwinter adult survival, final tag quotas may fall below the proposed range.

The proposal provides a range of tag numbers for each zone listed from which a final number will be determined, based on the post-winter status of each deer herd. The number of tags is intended to allow the appropriate level of hunting opportunity and harvest of bucks in the population, while achieving or maintaining the buck ratios at or near objective levels set forth in the approved deer herd management plans. Administrative procedures and the Fish and Game Code require the Fish and Game Commission to receive proposed changes to the existing regulations prior to the time when final, post-season deer herd surveys are conducted in the affected zones.

<i>Number of Tags</i>		
<i>Zone</i>	<i>Current</i>	<i>Proposed</i>
X-1	2,700	1,000-6,000
X-2	145	50-500
X-3a	275	150-1,500
X-3b	880	200-3,000
X-4	540	100-1,500
X-5a	145	50-300
X-5b	305	50-800
X-6a	460	100-1,200
X-6b	315	100-1,200
X-7a	255	50-600
X-7b	60	0-200
X-8	480	100-750
X-9a	950	100-1,200
X-9b	300	100-600
X-9c	850	100-1,000
X-10	400	200-600
X-12	855	100-1,200

Subsection 360(c). Deer: Additional Hunts

Existing regulations provide for the number of hunting tags for the additional hunts. The proposal changes the number of tags for all hunts to a series of ranges. The proposal provides a range of tag numbers for each hunt listed from which a final number will be determined, based on the post-winter status of each deer herd. The number of tags is intended to allow the appropriate level of hunting opportunity and harvest of bucks in the population, while achieving or maintaining the buck ratios at or near objective levels set forth in the approved deer herd management plans. The actual tag numbers for each affected hunt will be reflected in the Final Statement and will be selected from the range of values provided by this proposal. These final values for the license tag numbers will be based upon findings from the annual herd composition counts.

NUMBER OF TAGS					
Hunt	Current	Proposed	Hunt	Current	Proposed
G-1	4,000	500–5,000	M-7	150	50–150
G-3	25	25–50	M-8	25	20–75
G-6	50	25–100	M-9	20	20–100
G-7	20 Military *	20 Military *	M-11	20	20–200
G-8	30 Military * 30 Public	30 Military * 30 Public	MA-1	150	0–250
G-9	15 Military * 15 Public	15 Military * 15 Public	MA-3	150	50–200
G-10	380 Military * 100 Public	380 Military * 100 Public	J-1	25	10–30
G-11	500 Military * and DOD **	500 Military * and DOD **	J-3	15	15–30
G-12	30	10–30	J-4	15	5–70
G-13	300	50–300	J-7	10	10–30
G-19	25	10–25	J-8	12	10–20
G-21	25	10–125	J-9	5	5–10
G-37	25	25–50	J-10	10 Military * 30 Public	10 Military * 30 Public
G-38	300	50–300	J-11	40	10–50
M-3	35	20–75	J-12	10	10–20
M-4	15	15–50	J-13	40	25–100
M-5	15	15–50	J-14	30	15–75
M-6	80	25–100	J-15	10	5–30

* Specific numbers of tags are provided for military hunts through a system which restricts hunter access to desired levels and ensures biologically conservative hunting programs.

** DOD = Department of Defense

Section 361. Archery Deer Hunting

Existing regulations provide for the number of hunting tags for area-specific archery hunts. The proposal changes the number of tags for all hunts to a series of ranges. These ranges are necessary, as the final number of tags cannot be determined until spring herd data are collected in March/April. Because severe winter conditions can have an adverse effect on herd recruitment and overwinter adult survival, final tag quotas may fall below the proposed range.

The proposal provides a range of tag numbers for the hunts listed from which a final number will be determined for each hunt, based on the post-winter status of the herd. The number of tags is designed to allow the appropriate harvest of bucks and does in the

population, while achieving or maintaining the buck and doe ratios at or near objective levels set forth in the approved deer herd management plans. Administrative procedures and the Fish and Game Code require the Commission to receive proposed changes to the current regulation prior to the time when final, post-winter deer herd surveys are conducted in the affected hunts.

The final tag numbers for each affected hunt will be reflected in the Final Statement and will be selected from the range of values provided by this proposal. These final values for license tag numbers will be based upon findings from the annual herd composition counts.

Area	Number of Tags	
	Current	Proposed
C-1 Archery (A-1)	500	50–1,000
C-4 Archery (A-2)	1,500	100–5,000
X-1 Archery (A-3)	215	50–1,000
X-2 Archery (A-4)	25	25–200
X-3a Archery (A-5)	50	25–300
X-3b Archery (A-6)	90	25–400
X-4 Archery (A-7)	80	25–400
X-5a Archery (A-8)	15	15–100
X-5b Archery (A-9)	30	15–100
X-6a Archery (A-11)	135	25–300
X-6b Archery (A-12)	60	25–200
X-7a Archery (A-13)	20	25–200
X-7b Archery (A-14)	15	15–100
X-8 Archery (A-15)	150	25–200
X-9a Archery (A-16)	390	50–750
X-9b Archery (A-17)	300	50–600
X-9c Archery (A-18)	350	50–500
X-10 Archery (A-19)	120	25–200
X-12 Archery (A-20)	145	25–500
Anderson Flat Archery Buck Hunt (A-21)	25	25–100
San Diego Archery Either-Sex Deer Hunt (A-22)	1,000	50–1,000
Los Angeles Archery Antlerless Deer Hunt (A-23)	500	100–1,500
Monterey Archery Either-Sex Deer Hunt (A-24)	100	25–200
Lake Sonoma Archery Either-Sex Deer Hunt (A-25)	25	20–100
Bass Hill Archery Buck Hunt (A-26)	40	25–100
Devil's Garden Archery Buck Hunt (A-27)	20	20–75
Covelo Archery Buck Hunt (A-30)	40	20–100
Los Angeles Archery Either-Sex Deer Hunt (A-31)	500	100–500

Section 362. Nelson Bighorn Sheep

Existing regulations provide for limited hunting of Nelson bighorn rams in six hunt zones. The proposed

change adjusts the number of tags based on annual bighorn sheep population surveys conducted by the Department. The following proposed number of tags was determined using the procedure described in Fish and Game Code Section 4902:

HUNT ZONE	NUMBER OF TAGS
Zone 1—Marble Mountains	2
Zone 2—Kelso Peak/Old Dad Mountains	4
Zone 3—Clark/Kingston Mountain Ranges	2
Zone 4—Orocopia Mountains	1
Zone 5—San Geronio Wilderness	2
Zone 6—Sheep Hole Mountains	1
Open Zone Fund-Raising Tags	2
TOTAL	14

The number of tags allocated for each of the six hunt zones is based on the results of the Department's 2000 estimate of the bighorn sheep population in each zone. Tags are proposed to be allocated to allow the take of less than 15 percent of the mature rams estimated in each zone.

Existing regulations provide for one fund-raising license tag that is valid in all zones. The proposed change includes adding an additional open zone fund-raising license tag. The number of tags authorized for the purpose of raising funds is not to exceed 15 percent of the total number of tags, and two fund-raising tags represent 14 percent of the total tags (14).

Editorial changes are also proposed to improve the clarity and consistency of the regulations.

Section 363. Pronghorn Antelope

Existing regulations provide for the number of pronghorn antelope hunting tags for each hunt zone. The proposed change provides a range of tags for most zones as follows:

Proposed Pronghorn Antelope Tag Allocation, 2001						
NUMBER OF TAGS						
Hunt Area	Archery-Only Season		General Season			
			Period 1		Period 2	
	Buck	Doe	Buck	Doe	Buck	Doe
Zone 1	1–10	0–3	3–60	0–20	0	0
Zone 2	1–10	0–3	20–80	0–25	0	0
Zone 3	2–20	0–7	25–150	0–50	25–130	0–50
Zone 4	2–20	0–7	25–150	0–50	25–150	0–50
Zone 5	1–15	0–5	3–150	0–50	0	0
Zone 6	1–5	0	3–20	0–7	0	0
Carrizo	–	–	1–5	0	0	0
Ash Creek Junior Hunt	–		1–10 Either-Sex		0	
Honey Lake Junior Hunt	–		1–10 Either-Sex		0	
Fund-Raising Hunt	2 Buck					

Final tag quotas for hunt zones will be determined based on results of a winter survey which should be completed and analyzed by March of 2001. Final tag quotas will provide for adequate hunting opportunities while allowing for a biologically appropriate harvest of bucks and does in specific populations. The final quota for each zone will be reported in the Final Statement.

Editorial changes are also proposed to include clarity and consistency of the regulations.

Section 364. Elk

Existing regulations provide elk license tag quotas for each hunt. Population size of the Tinemaha subherd has been reduced as a result of the Tinemaha zone hunt which was implemented in 1998. The proposed change will reduce the number of tags for the third period Tinemaha hunt from 4 bull and 10 antlerless tags to 2 bull tags.

Editorial changes are also proposed to improve the clarity and consistency of the regulations.

Section 401. Issuance of Permits to Kill Deer, Bear, Elk, Wild Pig, Gray Squirrel and Beaver Causing Damage.

The existing regulation provides for the issuance of depredation permits, including special depredation permits, authorizing the take of wild pigs which damage or threaten to damage property. In general, it requires permittees to notify the Department after taking wild pigs and to make the carcasses of wild pigs taken under these permits available for delivery to a recognized charitable organization. An exception is provided where the carcass is not suitable for human consumption based on specific conditions as determined by a Department of Fish and Game officer. Based on recent interpretations of meat inspection standards and an increased concern for potential food safety with donations to charities, disposing of wild pig through that means is no longer appropriate. Alternative means of disposing of wild pig carcasses, while making use of those that are suitable for human consumption, are needed and the existing regulation needs to be clarified for consistent enforcement and public understanding.

The proposed changes would amend the conditions for special depredation permits for pigs as follows:

1. Require permittees to provide the Department with a written report, on or before the 15th day of each month for pigs taken in the preceding month, with specific information requested on pigs taken;
2. Authorize the carcasses of wild pigs taken under special permits to be utilized by the permittee;
3. Require that carcasses shipped from the property be marked with specific information identifying the permittee;

4. Clarify that, under specific conditions, the carcasses of wild pigs may be left where taken and that, where reasonable efforts are made to utilize wild pig carcasses, the permittee is in compliance with Fish and Game Code Section 4304 related to the waste of game mammal carcasses;
5. Specify that a permittee may designate up to three agents to take wild pigs while acting under the control of the permittee; and
6. Renumber subsections and make editorial changes for clarity and consistency of the regulation.

NOTICE IS GIVEN that any person interested may present statements, orally or in writing, relevant to this action at a hearing to be held at The Hilton, 1000 Aguajito Road, Monterey, on Friday, April 6, 2001 at 8:30 a.m., or as soon thereafter as the matter may be heard. It is requested, but not required, that written comments be submitted on or before March 30, 2001, at the address given below, or by fax at (916) 653-5040, or by e-mail to jduffy@dfg.ca.gov, but must be received no later than April 6, 2001 at the hearing in Monterey, CA. E-mail comments must include the true name and mailing address of the commentor.

The regulations as proposed in strikeout-underline format, as well as an initial statement of reasons, including environmental considerations and all information upon which the proposal is based (rulemaking file), are on file and available for public review from the agency representative, John M. Duffy, Assistant Executive Director, Fish and Game Commission, 1416 Ninth Street, Box 944209, Sacramento, California 94244-2090, phone (916) 653-4899. Please direct inquiries to John M. Duffy or Jon D. Snellstrom at the preceding address or phone number. Sonke Mastrup, Wildlife Programs Branch, Department of Fish and Game, phone (916) 653-9566 has been designated to respond to questions on the substance of the proposed regulations. Copies of the initial statement of reasons, including the regulatory language, may be obtained from the address above.

AVAILABILITY OF MODIFIED TEXT

If the regulations adopted by the Commission differ from but are sufficiently related to the action proposed, they will be available to the public for at least 15 days prior to the date of adoption. Circumstances beyond the control of the Commission (e.g., timing of Federal regulation adoption, timing of resource data collection, timelines do not allow, etc.) or changes made to be responsive to public recommendation and comments during the regulatory process may preclude full compliance with the 15-day comment period, and the Commission will exercise its powers under Section

202 of the Fish and Game Code. Regulations adopted pursuant to this section are not subject to the time periods for adoption, amendment or repeal of regulations prescribed in Sections 11343.4, 11346.4 and 11346.8 of the Government Code. Any person interested may obtain a copy of said regulations prior to the date of adoption by contacting the agency representative named herein.

If the regulatory proposal is adopted, the final statement of reasons may be obtained from the address above when it has been received from agency program staff.

IMPACT OF REGULATORY ACTION

The potential for significant statewide adverse economic impacts that might result from the proposed regulatory action has been assessed, and the following initial determinations relative to the required statutory categories have been made:

- (a) Significant Statewide Adverse Economic Impact Directly Affecting Business, including the Ability of California Businesses to Compete with Businesses in Other States:

The proposed actions will not have significant statewide adverse economic impacts directly affecting business, including the ability of California businesses to compete with businesses in other states.

Sections 360(a), (b) and (c)—The proposed action adjusts tag quotas for existing hunts. Given the number of tags available and the area over which they are distributed, these proposals are economically neutral to business.

Section 361—The proposed regulatory action will have no significant adverse economic impacts on businesses because the action has no business associated with its intended outcome.

Section 362—The proposed action adjusts tag quotas. Given the few number of bighorn sheep tags that are available each year, this proposal is economically neutral to business.

Section 363—The proposed action adjusts tag quotas for existing pronghorn antelope hunts. Given the minor nature of the change in pronghorn tags that are proposed, this proposal is economically neutral to business.

Section 364—The proposed action adjusts tag quotas for existing elk hunts. Given the minor nature of the change in elk tags that are proposed, this proposal is economically neutral to business.

Section 401—Adoption of the proposed regulations will allow farmers, ranchers and other landowners suffering property damage from wild pigs to take wild pigs under relaxed regulations.

- (b) Impact on the Creation or Elimination of Jobs within the State, the Creation of New Businesses or the Elimination of Existing Businesses, or the Expansion of Businesses in California: None.
- (c) Cost Impact on a Representative Private Person or Business: The agency is not aware of any cost impacts that a representative private person or business would necessarily incur in reasonable compliance with the proposed actions.
- (d) Costs or Savings to State agencies or Costs/Savings in Federal funding to the State: None.
- (e) Nondiscretionary Costs/Savings to Local Agencies: None.
- (f) Programs mandated on Local Agencies or School Districts: None.
- (g) Costs Imposed on any Local Agency or School District that is Required to be Reimbursed Under Part 7 (commencing with Section 17500) of Division 4: None.
- (h) Effect on Housing Costs: None.

EFFECT ON SMALL BUSINESS

It has been determined that the adoption of these regulations may affect small business.

CONSIDERATION OF ALTERNATIVES

The agency must determine that no reasonable alternative considered by the agency, or that has otherwise been identified and brought to the attention of the agency, would be more effective in carrying out the purpose for which the action is proposed or would be as effective and less burdensome to affected private persons than the proposed action.

TITLE 14. FISH AND GAME COMMISSION

Notice of Proposed Changes in Regulations

NOTICE IS HEREBY GIVEN that the Fish and Game Commission, pursuant to the authority vested by Section 8587.1 of the Fish and Game Code and to implement, interpret or make specific sections 8043, 8586 and 8587 of said Code, proposes to add Section 150.03, Title 14, California Code of Regulations, regarding a nearshore fishery control date for gear endorsement program.

INFORMATIVE DIGEST/POLICY STATEMENT OVERVIEW

Existing law delegates authority to the Fish and Game Commission (Commission) to adopt interim fisheries management regulations, and authority to make statutes inoperative regarding the nearshore

finfish fishery off California pending the adoption of a nearshore fishery management plan on or before January 1, 2002 (Fish and Game Code Sections 7072, 8587 and 8587.1). Existing law regulates the finfish trap and hook-and-line fisheries off California, including the amount, construction, and use of the gear (Fish and Game Code Sections 9001.6, 9001.7, 9027 and 9027.5).

Existing law does not establish a control date for the use of fishing gear (traps, hook and line, nets, etc.) that will establish a recognized point in time before which fishery participants using various gear types may qualify for a gear endorsement based on criteria to be developed and adopted by the Commission.

The nearshore trap and hook-and-line fisheries target nearshore finfish including rockfish, cabezon, greenlings, California sheephead, and California scorpionfish in waters generally shallower than 100 feet deep. These fisheries have developed and expanded greatly off California during the past decade. The amount, type, and efficiency of the gear now authorized for use has raised concerns for the effects of this fishing gear on nearshore fish stocks.

The Department has proposed the Commission adopt a control date of October 20, 2000 for the purpose of developing a gear endorsement program. The control date, in addition with other criteria to be developed in cooperation with nearshore fishery participants, will determine the conditions under which nearshore fishery permittees may qualify for, and use, fishing gear authorized in the nearshore fishery. The control date will be used to determine those nearshore fishery permittees who have reported at least one landing of nearshore fish stocks, as defined pursuant to Fish and Game Code Section 8586, with a gear type identified on fish receipts described pursuant to Fish and Game Code Section 8043, and received by the Department on or before October 20, 2000. Landing of nearshore fish stocks with a gear type on or before October 20, 2000 may be used to determine a nearshore permittee's eligibility to qualify for a gear endorsement authorizing the use of a gear type under such conditions as the Commission may prescribe.

NOTICE IS ALSO GIVEN that any person interested may present statements, orally or in writing, relevant to this action at a hearing to be held at the Hilton, 1000 Aguajito Road, Monterey, Ca, on Friday, April 6, 2001 at 8:30 a.m., or as soon thereafter as the matter may be heard. It is requested, but not required, that written comments be submitted on or before March 30, 2001 at the address given below, or by fax at (916) 653-5040, or by e-mail to jduffy@dfg.ca.gov, but must be received no later than April 6, 2001, at the

hearing in Monterey, CA. E-mail comments must include the true name and mailing address of the commentor.

The regulations as proposed in ~~strikeout~~-underline format, as well as an initial statement of reasons, including environmental considerations and all information upon which the proposal is based (rulemaking file), are on file and available for public review from the agency representative, John M. Duffy, Assistant Executive Director, Fish and Game Commission, 1416 Ninth Street, Box 944209, Sacramento, California 94244-2090, phone (916) 653-4899. Please direct inquiries to John M. Duffy or Kathy Maxwell at the preceding address or phone number. Don Schultze, Marine Region, Department of Fish and Game, phone (916) 722-7658, has been designated to respond to questions on the substance of the proposed regulations. Copies of the initial statement of reasons, including the regulatory language, may be obtained from the address above.

AVAILABILITY OF MODIFIED TEXT

If the regulations adopted by the Commission differ from but are sufficiently related to the action proposed, they will be available to the public for at least 15 days prior to the date of adoption. Any person interested may obtain a copy of said regulations prior to the date of adoption by contacting the agency representative named herein.

If the regulatory proposal is adopted, the final statement of reasons may be obtained from the address above when it has been received from agency program staff.

IMPACT OF REGULATORY ACTION

The potential for significant statewide adverse economic impacts that might result from the proposed regulatory action has been assessed, and the following initial determinations relative to the required statutory categories have been made:

- (a) Significant Statewide Adverse Economic Impact Directly Affecting Business, including the Ability of California Businesses to Compete with Businesses in Other States:

The proposed action will not have a significant statewide adverse economic impact directly affecting business, including the ability of California businesses to compete with businesses in other states. The adoption of a control date, by itself, should have no economic impact on businesses. Establishing the control date will not preclude currently active fishermen, or those becoming active from this point until other gear endorsement criteria are established. At some future point when criteria are established, some fishermen who have not fished until now may not qualify to use

specified gear types to take nearshore fishes, resulting in an unknown economic impact at that time.

(b) Impact on the Creation or Elimination of Jobs within the State, the Creation of New Businesses or the Elimination of Existing Businesses, or the Expansion of Businesses in California: None.

(c) Cost Impacts on a Representative Private Person or Business:

The agency is not aware of any cost impacts that a representative private person or business would necessarily incur in reasonable compliance with the proposed action.

(d) Costs or Savings to State agencies or Costs/Savings in Federal funding to the State: None.

(e) Nondiscretionary Costs/Savings to Local Agencies: None.

(f) Programs mandated on Local Agencies or School Districts: None.

(g) Costs Imposed on any Local Agency or School District that is Required to be Reimbursed Under Part 7 (commencing with Section 17500) of Division 4: None.

(h) Effect on Housing Costs: None.

EFFECT ON SMALL BUSINESS

It has been determined that the adoption of these regulations may affect small business.

CONSIDERATION OF ALTERNATIVES

The agency must determine that no reasonable alternative considered by the agency, or that has otherwise been identified and brought to the attention of the agency, would be more effective in carrying out the purpose for which the action is proposed or would be as effective and less burdensome to affected private persons than the proposed action.

TITLE 14. FISH AND GAME COMMISSION

NOTICE OF PROPOSED CHANGES IN REGULATIONS

NOTICE IS HEREBY GIVEN that the Fish and Game Commission, pursuant to the authority vested by sections 200, 202, 205, 220, 240, 2084 and 7891 of the Fish and Game Code and to implement, interpret or make specific sections 200, 202, 205 and 2084 of said Code, proposes to amend Section 27.80, Title 14, California Code of Regulations to conform ocean sportfishing regulations for salmon within state waters to those agreed upon by the Pacific Fisheries Management Council (PFMC).

INFORMATIVE DIGEST/POLICY STATEMENT OVERVIEW

The Pacific Fishery Management Council (PFMC) annually reviews the status of west coast salmon populations. As part of that process, it recommends ocean fishing regulations aimed at meeting biological and fishery allocation goals specified in law or established in the Salmon Fishery Management Plan.

The PFMC is expected to adopt regulation recommendations, similar to recent years, for the recreational ocean salmon fisheries in Federal waters (3 to 200 miles offshore) off the states of Washington, Oregon, and California for 2001. The various alternatives the PFMC will examine in the process of adopting the management options on March 9, 2001, for public review may include:

1. Minimum size of salmon that may be retained;
2. the number of rods anglers may use (e.g., one, two, or unlimited);
3. the type of bait and/or terminal gear that may be used (e.g., amount of weight, hook type, and type of bait or no bait);
4. the number of salmon that may be retained per angler-day or period of days;
5. allowable fishing dates and areas; and
6. the overall number of salmon that may be harvested, by species and area.

The final regulation recommendations will be made by the PFMC on April 6, 2001. Upon approval of the PFMC's management recommendations by the Secretary of Commerce, the State must move in a timely manner to conform its ocean sport fishing regulations for salmon in State waters (0 to 3 miles offshore) to those agreed upon by the PFMC; otherwise preemption of State regulatory authority by the Secretary of Commerce may occur.

NOTICE IS ALSO GIVEN that any person interested may present statements, orally or in writing, relevant to this action at a hearing to be held at The Hilton, 1000 Aguajito Road, Monterey, on Friday, April 6, 2001, at 8:30 a.m., or as soon thereafter as the matter may be heard. It is requested, but not required, that written comments be submitted on or before March 30, 2001, at the address given below, or by fax at (916) 653-5040, or by e-mail to jduffy@dfg.ca.gov, but must be received no later than April 6, 2001 at the hearing in Monterey, CA. E-mail comments must include the true name and mailing address of the commentor.

The regulations as proposed in ~~strikeout~~-underline format, as well as an initial statement of reasons, including environmental considerations and all infor-

mation upon which the proposal is based (rulemaking file), are on file and available for public review from the agency representative, John M. Duffy, Assistant Executive Director, Fish and Game Commission, 1416 Ninth Street, Box 944209, Sacramento, California 94244-2090, phone (916) 653-4899. Please direct inquiries to John M. Duffy or Tracy L. Reed at the preceding address or phone number. Scott Barrow, Marine Region, Department of Fish and Game, phone (707) 431-4343, has been designated to respond to questions on the substance of the proposed regulations. Copies of the initial statement of reasons, including the regulatory language, may be obtained from the address above.

AVAILABILITY OF MODIFIED TEXT

If the regulations adopted by the Commission differ from but are sufficiently related to the action proposed, they will be available to the public for at least 15 days prior to the date of adoption. Circumstances beyond the control of the Commission (e.g., timing of Federal regulation adoption, timing of resource data collection, timelines do not allow, etc.) or changes made to be responsive to public recommendation and comments during the regulatory process may preclude full compliance with the 15-day comment period, and the Commission will exercise its powers under Section 202 of the Fish and Game Code. Regulations adopted pursuant to this section are not subject to the time periods for adoption, amendment or repeal of regulations prescribed in Sections 11343.4, 11346.4 and 11346.8 of the Government Code. Any person interested may obtain a copy of said regulations prior to the date of adoption by contacting the agency representative named herein.

If the regulatory proposal is adopted, the final statement of reasons may be obtained from the address above when it has been received from agency program staff.

IMPACT OF REGULATORY ACTION

The potential for significant statewide adverse economic impacts that might result from the proposed regulatory action has been assessed, and the following initial determinations relative to the required statutory categories have been made:

- (a) Significant Statewide Adverse Economic Impact Directly Affecting Business, including the Ability of California Businesses to Compete with Businesses in Other States: The proposed action will not have a significant statewide adverse economic impact affecting business, including the ability of California businesses to compete with businesses in other states. Regulations close to status quo are expected to be adopted.

- (b) Impact on the Creation or Elimination of Jobs within the State, the Creation of New Businesses or the Elimination of Existing Businesses, or the Expansion of Businesses in California: None.
- (c) Cost Impacts on a Representative Private Person or Business: The agency is not aware of any cost impacts that a representative private person or business would necessarily incur in reasonable compliance with the proposed action.
- (d) Costs or Savings to State Agencies or Costs/Savings in Federal funding to the State: None.
- (e) Nondiscretionary Costs/Savings to Local Agencies: None.
- (f) Programs Mandated on Local Agencies or School Districts: None.
- (g) Costs Imposed on any Local Agency or School District that is Required to be Reimbursed Under Part 7 (commencing with Section 17500) of Division 4: None.
- (h) Effect on Housing Costs: None.

EFFECT ON SMALL BUSINESS

It has been determined that the adoption of these regulations may affect small business.

CONSIDERATION OF ALTERNATIVES

The agency must determine that no reasonable alternative considered by the agency, or that has otherwise been identified and brought to the attention of the agency, would be more effective in carrying out the purpose for which the action is proposed or would be as effective and less burdensome to affected private persons than the proposed action.

TITLE 14. OFFICE OF SPILL PREVENTION AND RESPONSE

NOTICE OF PROPOSED RULEMAKING

Notice is hereby given that the Office of Spill Prevention and Response (OSPR) within the Department of Fish and Game, proposes to amend Sections 851.20–851.32 in Chapter 4, Subdivision 4, Title 14 of the California Code of Regulations (CCR). These sections pertain to guidelines for Tank Vessel Escorts for Los Angeles/Long Beach Harbors.

PUBLIC HEARING

A public hearing has been scheduled at which any interested party may present statements, orally or in writing, about this proposed regulatory action. The hearing will continue until all testimony is completed, and will be held as follows:

April 4, 2001
Port of Long Beach
Administration Building
925 Harbor Plaza
Long Beach, CA
Sixth Floor Hearing Room
9:30 a.m.

Pre-hearing registration will be conducted just prior to the hearing. Those registered will be heard in the order of their registration. Anyone else wishing to speak at the hearing will be afforded such opportunity after those registered have been heard. The time allowed for each person to present oral testimony may be limited if a substantial number of people wish to speak.

Individuals presenting oral testimony are requested, but not required, to submit a written copy of their statements. The hearing will be adjourned immediately following the completion of the oral testimony.

SUBMISSION OF WRITTEN COMMENTS

Any interested person, or his or her authorized representative, may submit written comments relevant to the proposed regulatory action to OSPR. All written comments must be received by OSPR at this office no later than 5:00 p.m. on April 4, 2001, in order to be considered. Written comments may be submitted by mail, fax, or e-mail, as follows:

Department of Fish and Game
Office of Spill Prevention and Response
P.O. Box 944209
Sacramento, California 94244-2090
Attention: Joy D. Lavin-Jones
Fax: (916) 324-5662
E-mail: jlavinj@ospr.dfg.ca.gov

PERMANENT ADOPTION OF REGULATIONS

OSPR may thereafter adopt the proposal substantially as described in this Notice, or may modify such proposals if such modifications are sufficiently related to the original text. With the exception of technical or grammatical changes, the full text of any modified proposals—with changes clearly indicated—will be available for 15 days prior to its adoption from the person designated in this Notice as contact person. The text will be mailed to those persons who submit written or oral testimony related to this proposal or who have requested notification of any changes to the proposal.

AUTHORITY AND REFERENCE

Government Code Section 8670.23.1 grants the Administrator the authority to adopt regulations and guidelines for harbor safety plans in consultation with the port authorities of the harbors and other affected parties. These regulations implement, interpret and

make specific Government Code Section 8670.23.1. Government Code Section 8670.23.1(d) requires that the Administrator shall give his highest priority to the development of regulations and guidelines concerning tug escorts.

INFORMATIVE DIGEST/POLICY STATEMENT OVERVIEW

The Lempert-Keene-Seastrand Oil Spill Prevention and Response Act (Act), enacted in 1990 by Senate Bill 2040, created a comprehensive state oil spill program for marine waters. Among its many provisions, the Act authorized the Administrator to create harbor safety committees for the following five harbors: San Diego; Los Angeles/Long Beach; Port Huenum; San Francisco, San Pablo and Suisun Bays; and Humboldt Bay. Each committee is required to develop harbor safety plans for the safe navigation and operation of tankers, barges and other vessels within the harbors. Government Code Section 8670.23 also directed the Administrator to adopt regulations and guidelines for the development of tug escort requirements for specified harbors.

There are existing regulations specifying the tug escort requirements for Los Angeles/Long Beach harbors. The proposed regulatory amendments would do the following:

- Clarify the purpose and scope of the Tank Vessel Escort Program for Los Angeles/Long Beach Harbors;

- Repeal unnecessary definitions and instead refer to definitions established elsewhere in the subdivision;

- Further refine the requirements for tankers to be exempted from tug escort requirements;

- Clarify the general escort tug requirements for tankers;

- Add an additional category to the tanker/tug matching criteria table, to accommodate larger tankers;

- Establish tank barge/tug matching criteria, including tethering, stationing and equipment requirements.

PLAIN ENGLISH STATEMENT

These regulation have been written in plain English. They do not use confusing concepts, technical language, or terms with meanings other than those in the dictionary. People directly or indirectly affected by these regulations will be able to understand them without special experience or training.

SMALL BUSINESS IMPACT STATEMENT

OSPR has determined that the proposed regulations may affect small businesses.

COMPLIANCE WITH GOVERNMENT CODE SECTIONS 8574.10 AND 8670.54

In accordance with Government Code Section 8574.10, these regulations have been submitted to the

Review Subcommittee of the State Interagency Oil Spill Committee for review and comment; and in accordance with Government Code Section 8670.54, these regulations have been submitted to the Oil Spill Technical Advisory Committee for review and comment.

DISCLOSURES REGARDING THE PROPOSED ACTION

Mandate on local agencies and school districts: NONE.

Costs or savings to any state agency: NONE.

Costs or savings to local agencies or school districts which must be reimbursed in accordance with Part 7 (commencing with Section 17500) of Division 4 of the Government Code: NONE.

Other non-discretionary costs or savings imposed upon local agencies: NONE.

Costs or savings in federal funding to the state: NONE.

Cost impacts on representative private persons or businesses:

These amendments codify current practices and will not result in significant additional costs to private persons or directly affected businesses. OSPR is not aware of any cost impacts that a representative private person or business would necessarily incur in reasonable compliance with the proposed action.

Significant effect on housing costs: NONE.

BUSINESS IMPACTS

The OSPR has made an initial determination that the proposed amendments will not have a significant statewide adverse economic impact on California businesses, including the ability of California businesses to compete with businesses in other states.

ASSESSMENT OF JOB/BUSINESS CREATION OR ELIMINATION

The OSPR has determined that this regulatory proposal will not have a significant impact on the creation or elimination of jobs in the State of California, and will not result in the elimination of existing businesses nor create or expand businesses in the State of California.

CONSIDERATION OF ALTERNATIVES

In accordance with Government Code Section 11346.5(a)(13), OSPR must determine that no reasonable alternative that has been considered or that has otherwise been identified and brought to the attention of OSPR would be more effective in carrying out the purpose for which this action is proposed or would be as effective and less burdensome to affected private persons than the proposed action.

AVAILABILITY OF DOCUMENTS AND OSPR CONTACT PERSON

OSPR has prepared an initial statement of reasons for the proposed regulatory action and has available all the information upon which the proposal is based. Copies of the exact language of the proposed regulations, statement of reasons, forms, the rulemaking file, the final statement of reasons (when available) and other information, if any, may be obtained upon request from the:

Department of Fish and Game
Office of Spill Prevention and Response
P.O. Box 944209
Sacramento, California 94244-2090

In addition, the exact language of the proposed regulations may be found on the World Wide Web at the following address: <http://www.dfg.ca.gov/Ospr/regulation/la-lb%20tugreg%20.pdf>

Questions regarding the proposed regulations, requests for documents, or any questions concerning the substance this regulatory action may be directed to Joy Lavin-Jones ((916) 327-0910), or Michelle Garcia ((916) 327-9782), at the above address.

GENERAL PUBLIC INTEREST

DEPARTMENT OF FISH AND GAME

PUBLIC INTEREST NOTICE

CESA CONSISTENCY DETERMINATION FOR SYCAMORE CREEK DEVELOPMENT, RIVERSIDE COUNTY, CALIFORNIA

The Department of Fish and Game ("Department") received a request, on February 5, 2001 from the project applicant, Rancon Financial, that consultations between the U. S. Fish and Wildlife Service ("Service") and the U. S. Army Corp of Engineers ("COE") regarding a proposed Sycamore Creek Development project in western Riverside County be considered consistent with the California Endangered Species Act ("CESA") pursuant to Fish and Game Code Section 2080.1. On January 31, 2001, the Service issued a biological opinion (1-6-01-F-1184.2) specifying measures to be undertaken by the project applicant to mitigate any impacts of the project to the state-listed threatened and federally-listed endangered plant, Munz's onion (*Allium munzii*, "onion"). If the Department determines that the federal biological opinion is consistent with CESA, the applicant will not be required to obtain an incidental take permit (Fish and Game Code Section 2081) for project impacts to this species.

**DEPARTMENT OF TOXIC
SUBSTANCES CONTROL**

**HOUSEHOLD HAZARDOUS WASTE UNIT
STATE REGULATORY PROGRAMS DIVISION
PUBLIC NOTICE FOR VARIANCE ISSUANCE**

On January 25, 2001, the State Regulatory Programs Division of the Department of Toxic Substances Control (DTSC) issued a three-year variance to the City of Diamond Bar. Authority for this action is contained in Health and Safety Code (HSC), section 25143. The variance was issued to conduct residential household waste collections. This variance authorizes the City of Diamond Bar through their contractor to collect household hazardous wastes (HHW) from the elderly, handicapped residents, and others unable to participate in the regular HHW collection program. Wastes are delivered to an authorized HHW collection facility authorized under permit-by-rule (PBR). No business or agricultural wastes are to be collected under this variance. Specific standards exempted are contained in the Health and Safety Code, section 25201 and Title 22, California Code of Regulations, Division 4.5, chapter 20. The collections are subject to strict operating standards specified in the variance. For additional information contact Lee Halverson at the Department of Toxic Substances Control, Household Hazardous Waste Unit at (510) 540-3894.

**ACTION DESCRIPTION FOR A HAZARDOUS
WASTE MANIFESTING VARIANCE, BY THE
STATEWIDE COMPLIANCE DIVISION,
TRANSPORTATION SECTION, FOR LADWP**

On November 30, 2000, the Department of Toxic Substances Control (DTSC), granted The City of Los Angeles, Department of Water and Power (LADWP), a variance from hazardous waste manifest requirements under Section 25160 of the California Health and Safety Code, and Sections 66262.20 and 66262.23 of the California Code of Regulations (CCR), Title 22. The variance allows the use of a bill of lading in lieu of a manifest to transport and dispose of arsenic and copper contaminated backwash solids that have been classified as a "Special Waste" by the Department of Toxic Substances Control (DTSC), Human and Ecological Risk Division (HERD) to a Class I hazardous waste facility authorized to receive the waste.

In providing quality potable water to the City of Los Angeles, LADWP imports water from the Owens River Valleys, and the water is treated at the LADWP where deep beds filtration units remove floc and impurities in the water. Arsenic is inherent to the surface waters of the Owens River, and copper sulfate is used for algae control in the treatment process. These filters are periodically back washed, or cleaned by reversing the direction of water flow to remove

solids contaminated with arsenic and copper. The removal of arsenic and copper is essential in providing safe quality drinking water to the residents of Los Angeles. The backwash water is diverted to settling ponds (eight total) where solids are allowed to concentrate and settle. On an annual basis, the ponds are drained and approximately 20,000 tons of contaminated solids are removed, characterized, and transported to a permitted facility. The annual removal of the contaminated solids takes approximately two to three weeks to complete, weather permitting. The variance imposes specific conditions to ensure protection of public health and the environment. A Notice of Exemption (Title 14, CCR, Section 15061(b)(3) [With certainty, no possibility of a significant effect on the environment]) was filed pursuant to the California Environmental Quality Act (CEQA).

The LADWP project site is located at the Los Angeles Aqueduct Filtration Plant, at 13101 Sepulveda Boulevard, Sylmar, California. The variance expires on November 30, 2002. For more information please call Maria Salomon of DTSC's Transportation Section at (916) 255-3624.

**HOUSEHOLD HAZARDOUS WASTE UNIT
STATE REGULATORY PROGRAMS DIVISION
PUBLIC NOTICE FOR VARIANCE ISSUANCE**

On January 25, 2001, the State Regulatory Programs Division of the Department of Toxic Substances Control (DTSC) issued a variance to Glenn County Public Works Department. Authority for this action is contained in Health and Safety Code (HSC), section 25143. The variance was issued to conduct a one-day collection of banned, unregistered, or outdated agricultural chemicals for Glenn County and the surrounding counties of Butte, Colusa, and Tehama. This variance authorizes Glenn County through its contractor to collect agricultural chemicals from qualifying farmers and agricultural businesses that have accumulated these chemicals. The dates and sites are:

March 14, 2001
Glenn County Public Works Yard
5700 County Road 13
Artois, California

No other hazardous wastes or materials are authorized to be collected under this variance. Specific standards exempted are contained in the HSC, section 25201 and Title 22, California Code of Regulations, Division 4.5, Chapter 20. The collections are subject to strict operating standards specified in the variance. For additional information contact Lee Halverson of the Department of Toxic Substances Control, Household Hazardous Waste Unit at (510) 540-3894.

**PUBLIC EMPLOYEES'
RETIREMENT SYSTEM
(CalPERS)**

**NOTICE OF PUBLIC HEARING TIME CHANGE
REGARDING PROPOSED REGULATORY
ACTION BY THE CALIFORNIA PUBLIC
EMPLOYEES' RETIREMENT SYSTEM'S BOARD
OF ADMINISTRATION**

TITLE 2

**CALIFORNIA CODE OF REGULATIONS
PROPOSED AMENDMENT TO SECTIONS 554,
554.3, 554.4, 554.6, 554.7, 554.8,
554.9 AND 554.10**

The Notice of Proposed Regulatory Actions to amend Title 2, sections 554, 554.3, 554.4, 554.6, 554.7, 554.8, 554.9 and 554.10 of the California Code of Regulations pertaining to Board member elections, was published in the *California Regulatory Notice Register*, Register 2000, No. 51-Z, December 22, 2000. Refer to this publication for complete information. The *California Regulatory Notice Register* can be accessed through the Office of Administrative Law's web site at www.oal.ca.gov.

NOTICE IS HEREBY GIVEN that the time for the PUBLIC HEARING on the proposed regulations listed above, is **10:30 a.m.**, not 1:30 p.m., at the CalPERS Benefits and Program Administration Committee Meeting as follows:

February 21, 2001, **10:30 a.m.**

CalPERS Benefits and Program Administration
Committee

California Public Employees' Retirement System
Auditorium, 400 P Street
Sacramento, California 95814

The hearing will be adjourned immediately following receipt of testimony.

**RULEMAKING PETITION
DECISIONS**

DEPARTMENT OF CORRECTIONS

**NOTICE OF DECISION ON PETITION TO
AMEND REGULATIONS**

California Code of Regulations
Title 15, Crime Prevention and Corrections
Division 3, Department of Corrections

PETITIONER

Thomas Sims

AUTHORITY

Under authority established in Penal Code (PC) Section 5058 the Director may prescribe and amend regulations for the administration of prisons. PC Section 5054 vests with the Director the supervision, management and control of the prisons, and the responsibility for the care, custody, treatment, training, discipline, and employment of persons confined therein.

CONTACT PERSON

Please direct any inquiries regarding this action to Rick Grenz, Chief, Regulation and Policy Management Branch, Department of Corrections, P.O. Box 942883, Sacramento, CA 94283-0001, or telephone (916) 324-4331.

AVAILABILITY OF PETITION

The petition for adoption of the regulations is available upon request directed to the Department's contact person.

SUMMARY OF PETITION

Petitioner requests the Department of Corrections amend the California Code of Regulations (CCR), Title 15, Division 3, Sections 3000, Definitions, specifically the definition of Life Prisoner, as it does not include Life Prisoners serving terms other than 15- or 25-years-to-life.

Petitioner also requests Section 3375.3, CDC Classification Score Sheet, CDC Form 839, Calculation, be amended as it erroneously adds excess points to the classification score for inmates sentenced to terms other than 15- or 25-years-to-life, causing a miscalculation of classification points which results in an assignment to an inappropriate facility level.

DEPARTMENT DECISION

The Director of Corrections grants the petition to amend CCR Section 3000, Definitions, to reflect changes in sentencing laws that have resulted in a wide range of sentences that include various base terms for which a prisoner may be sentenced. The definition should be "a prisoner serving any number of years to life."

Section 3375.3(a)(1)(A) will be amended to make it clear that the minimum base term for prisoners serving life sentences as defined in Section 3000 is to be 15 years for purposes of classification score. It will also be changed to reflect recent changes to the sentencing laws. With the application of the Three Strikes laws there are any number of minimum terms on a life sentence. For instance, a literal reading of the section would require an inmate serving a term of "life without parole for 20 years" to have a base term of

20 years but an inmate sentenced under the three strikes law to 40 years-to-life to have a base term of 15 years.

DEPARTMENT OF HEALTH SERVICES

December 19, 2000

Michael J. Arnold
Legislative Advocate
California Clinical Laboratory Association
1127 Eleventh Street, Suite 820
Sacramento, California 95814

UNFAIR LABORATORY FEE STRUCTURE— REQUEST FOR REPEAL OF REGULATIONS

Dear Mr. Arnold:

Thank you for your letter dated November 16, 2000, in which you petition the Department of Health Services (Department) to repeal title 17, California Code of Regulations, sections 1039.1, 1039.2, 1039.3, 1041, 1054.6, and 1054.7. Such petition is made pursuant to Government Code section 11340.7. I am responding to your petition.

The Department has given consideration to your petition in accordance with Government Code section 11340.7 and has determined to grant in part your petition regarding repeal of sections 1039.1 and 1039.3, and deny your request to repeal sections 1039.2, 1041, 1054.6 and 1054.7. In your letter, you request repeal of the aforementioned sections as they “create a severe inequity in the clinical laboratory field and a shortage of revenue” which the department could use for laboratory oversight and Medi-Cal fraud enforcement. The Department does not believe that repeal of sections 1039.2, 1041, 1054.6 or 1054.7 would further this goal. Specifically:

- Section 1039.2 specifies personnel requirements for persons “performing, supervision, consulting on, or directing clinical laboratory tests or examinations” in California, or for out-of-state laboratories which receive specimens originating in California.
- Section 1041 specifies that the fees that are statutorily required to be reduced, pursuant to Business and Professions Code section 1300 shall be “credited against the clinical laboratory’s future license, registration, or other fees payable under Chapter 3.”
- Section 1054.6 was repealed on March 19, 1997.
- Section 1054.7 specifies the requirements that must be met by a licensed psychiatric technician, licensed vocational nurse, licensed midwife, certified emergency medical technician II, paramedic, certified

nurse assistant, or certified home health aide, prior to the performance of any clinical laboratory test or examination.

Accordingly, the Department has determined to deny in part your petition requesting the repeal of title 17, California Code of Regulations, sections 1039.3, 1041, 1054.6, and 1054.7, and grant your petition to repeal sections 1039.1 and 1039.3.

You should be aware that pursuant to Government Code section 11340.7(c), you, or any other interested person may request reconsideration of any part or all of the Department’s decision regarding this petition no later than 60 days after the date of this letter.

A copy of this letter will be sent to the Office of Administrative Law for publication in the California Regulatory Notice Registrar, pursuant to Government Code section 11340.7(d).

If you, or any other interested person, would like a copy of the petition or wish to discuss this matter further, please do not hesitate to contact me.

Very truly yours,

Cindy Lloyd
Staff Attorney

cc: Allison Branscombe, Chief
Office of Regulations
714 P Street, Room 1000
Sacramento, CA 95814

SUMMARY OF REGULATORY ACTIONS

REGULATIONS FILED WITH SECRETARY OF STATE

This Summary of Regulatory Actions lists regulations filed with the Secretary of State on the dates indicated. Copies of the regulations may be obtained by contacting the agency or from the Secretary of State, Archives, 1020 O Street, Sacramento, CA, 95814, (916) 653-7715. Please have the agency name and the date filed (see below) when making a request.

**BOARD OF GOVERNORS OF THE CALIFORNIA
COMMUNITY COLLEGES**
Nondiscrimination in Programs Receiving State
Financial Assistance

The Board of Governors, California Community Colleges, is making the subject amendments pursuant to Education Code section 70901.5 which provides that these changes are exempt from review by the Office of Administrative Law.

Title 5

California Code of Regulations

ADOPT: 59311, 59339, 59351 AMEND: 59300, 59303, 59320, 59322, 59326, 59327, 59328, 59330, 59336, 59338, 59340, 59342, 59350, 59356, 59358, 59360, 53002 REPEAL : 59301, 59307, 59311

Filed 02/07/01

Effective 03/09/01

Agency Contact:

Renee Brouillette (916) 322-4145

BUREAU OF AUTOMOTIVE REPAIR

Smog Check Stations, Technicians and Training Institutions

This filing is a resubmittal of a regulatory action which revises existing regulations on the requirements for smog check stations, technicians, training institutions and instructors.

Title 16

California Code of Regulations

AMEND: 3340.16, 3340.16.5, 3340.22.1, 3340.22.2, 3340.28, 3340.29, 3340.32, 3340.33, 3340.41

Filed 02/01/01

Effective 02/01/01

Agency Contact: Yvette Johnson (916) 255-1099

COMMISSION ON STATE MANDATES

Reconsideration of a Prior Final Decision

This regulatory action amends section 1188.4 regarding reconsideration of a prior final decision. This filing is exempt from OAL review pursuant to Government Code section 17527 and is submitted to OAL for printing only and filing with the Secretary of State.

Title 2

California Code of Regulations

AMEND: 1188.4

Filed 02/02/01

Effective 03/04/01

Agency Contact: Kathleen Lynch (916) 323-8221

DEPARTMENT OF CONSERVATION

Selection of Professional Service Firms

The regulatory action is the Certificate of Compliance for emergency regulations that dealt with the selection of professional service firms. (Prior OAL File 00-0822-02E.)

Title 14

California Code of Regulations

ADOPT: 1690, 1690.1, 1691, 1692, 1693, 1694, 1695, 1696, 1697, 1698, 1699

Filed 02/01/01

Effective 02/01/01

Agency Contact: Marilu Habel (916) 445-9686

DEPARTMENT OF FORESTRY AND FIRE PROTECTION

Conflict of Interest

Health and Safety Code section 13100(b) vests with the Department of Forestry and Fire Protection all the powers, duties, responsibilities, and jurisdiction of the former Office of the State Fire Marshal. The instant filing is repealing the conflict of interest code as filed by the Office of the State Fire Marshal, and is amending its conflict of interest code section to include those duties, etc. The Fair Political Practices Commission approved the captioned changes for filing on December 1, 2000. The subject conflict of interest codes are exempt from review by the Office of Administrative Law.

Title 14

California Code of Regulations

AMEND: 890 REPEAL: Title 19, California Code of Regulations, sections 2200, 2201, 2202, 2203, 2204, 2205, 2206, 2207, and 2208.

Filed 02/07/01

Effective 03/09/01

Agency Contact: Dennis O. Hall (916) 653-9418

DEPARTMENT OF HEALTH SERVICES

Antidecubitus Care Support Surfaces

This Certificate of Compliance amends the Manual of Criteria for Medi-Cal Authorization for coverage of Durable Medical Equipment and antidecubitus care.

Title 22

California Code of Regulations

AMEND: 51003, 51160, 51321, 51521

Filed 02/05/01

Effective 02/05/01

Agency Contact: Sandra Ortega (916) 657-3174

DEPARTMENT OF HEALTH SERVICES

Sign Language Interpreter Services

This Certificate of Compliance adopts the criteria for Medi-Cal reimbursement for sign language interpreters. (Previous OAL file #00-0815-01E)

Title 22

California Code of Regulations

ADOPT: 51098.5, 51202.5, 51309.5, 51503.3

Filed 02/02/01

Effective 02/02/01

Agency Contact: Sandra Ortega (916) 657-3174

DEPARTMENT OF HEALTH SERVICES

Two-Plan Model Enrollment/Disenrollment

The proposed print only regulatory action makes revisions to enrollment/disenrollment requirements governing the Department's Medi-Cal Two-Plan Model Managed Care Program. The proposed regula-

tory action was submitted to OAL for printing only pursuant to section 147 of S.B. 485 (Chap. 722, Stats. 1992).

Title 22
California Code of Regulations
AMEND: 53845, 53881, 53886, 53887, 53888, 53889, 53891, 53892, 53895
Filed 02/02/01
Effective 03/04/01
Agency Contact: Sandra Ortega (916) 657-3174

DEPARTMENT OF HOUSING AND COMMUNITY DEVELOPMENT

Child Care Facilities Financing Program

This regulatory action implements Chapter 270, Statutes of 1997, the Thompson-Maddy-Ducheny-Ashburn Welfare-to-Work Act of 1997 which, among other things, established both a loan guarantee and a direct loan program for child care and development facilities to help preserve and increase the amount of child care spaces available.

Title 25
California Code of Regulations
ADOPT: 8250, 8251, 8252, 8253, 8254, 8255, 8256, 8257, 8258, 8259, 8260, 8261, 8262, 8263, 8264, 8265, 8266, 8267, 8268, 8269, 8270, 8271, 8272, 8273
Filed 02/02/01
Effective 02/02/01
Agency Contact: Lenora Frazier (916) 323-7288

DEPARTMENT OF JUSTICE

Laboratory Certification, Firearms Safety Devices, Gun Safe Standards

This emergency rulemaking action implements the laboratory certification and firearms safety device testing programs mandated by California Penal Code sections 12087-12088.9, establishes procedures to create and maintain a roster of certified laboratories and a roster of certified firearms safety devices, and establish standards and testing requirements for gun safes and firearms safety devices.

Title 11
California Code of Regulations
ADOPT: 977.10, 977.15, 977.20, 977.30, 977.31, 977.32, 977.33, 977.34, 977.35, 977.36, 977.40, 977.41, 977.42, 977.43, 977.44, 977.45, 977.46, 977.47, 977.48, 977.49, 977.50, 977.51, 977.60, 977.70, 977.71, 977.80, 977.80
Filed 02/01/01
Effective 02/01/01
Agency Contact: Bill Statti (916) 263-0850

PUBLIC UTILITIES COMMISSION

Rules of Practice & Procedure: Form Nos. 2 and 6

This action corrects lettering errors and a typographical error found in two forms used in administrative proceedings of the Public Utilities Commission.

Title 20
California Code of Regulations
AMEND: 88
Filed 01/31/01
Effective 01/31/01
Agency Contact:
Judge Joseph DeUlloa (415) 703-3124

RESOURCES AGENCY

CEQA Guidelines

This action corrects cross-references to conform to changes in related laws, deletes obsolete references, and adds a new mailing address for the State Clearinghouse.

Title 14
California Code of Regulations
AMEND: 15064, 15082, 15086, 15105, 15127, 15130, 15176, 15205, 15206, 15251, 15274, 15280, 15301, 15330, Appendix F, Appendix G
Filed 02/01/01
Effective 03/03/01
Agency Contact: Kristi Powers (916) 653-5481

TECHNOLOGY, TRADE AND COMMERCE AGENCY

Defense Retention Grant Program

The emergency regulatory action deals with the Defense Retention Grant Program.

Title 10
California Code of Regulations
ADOPT: 4083, 4083.1, 4083.2, 4083.3, 4083.4, 4083.5,
Filed 02/07/01
Effective 02/07/01
Agency Contact: Kathryn Doi (916) 324-3836

**CCR CHANGES FILED WITH THE
SECRETARY OF STATE
WITHIN OCTOBER 04, 2000 TO
FEBRUARY 07, 2001**

All regulatory actions filed by OAL during this period are listed below by California Code of Regulation's titles, then by date filed with the Secretary of State, with the Manual of Policies and Procedures changes adopted by the Department of Social Services listed last. For further information on a particular file, contact the person listed in the

Summary of Regulatory Actions section of the Notice Register published on the first Friday more than nine days after the date filed.

Title 1

12/28/00 AMEND : 4, 10 REPEAL : 45

Title 2

02/02/01 AMEND : 1188.4
 01/25/01 AMEND : 599.960, 599.961, 599.963, 599.964, 599.965
 01/25/01 ADOPT : 589, 589.1, 589.2, 589.3, 589.4, 589.5, 589.6, 589.7, 589.8, 589.9, 589.10
 01/22/01 ADOPT : 18573
 01/18/01 ADOPT : 18705.1 REPEAL : 18705.1
 01/17/01 ADOPT : 18232 AMEND : 18703.5, 18704.5, 18705, 18705.3, 18705.5
 01/16/01 ADOPT : 18707.9 AMEND : 18707, 18707.1, 18707.2, 18707.3, 18707.7
 01/16/01 ADOPT : 18503 REPEAL : 18502, 18502.1
 01/16/01 AMEND : 18704.2, 18705.2
 01/11/01 AMEND : 1194
 01/11/01 AMEND : 18701
 01/10/01 AMEND : 18702.1, 18708, 18730
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 01/17/01 ADOPT : 4300, 4302, 4304, 4306, 4308, 4310, 4312, 4314, 4316, 4318, 4320, 4322, 4324 AMEND : 4004

Title 27

11/01/00 AMEND : 15240

Title MPP

01/17/01 ADOPT : 50-025 AMEND : 80-310
 01/08/01 AMEND : 42-205, 43-119, 44-133 REPEAL : 44-353
 01/04/01 AMEND : 23-625.2
 12/21/00 ADOPT : 11-301, 90-101, 90-105, 90-110, 90-115 AMEND : 31-201, 40-121, 40-181, 40-183, 40-188, 40-189, 40-190, 42-101, 42-302, 42-712, 44-133, 44-316, 44-317, 82-510, 82-820, 82-832
 12/12/00 AMEND : 46-105, 46-430
 11/16/00 AMEND : 11-400, 11-402

**OAL REGULATORY
DETERMINATIONS**

**STATE OF CALIFORNIA
OFFICE OF ADMINISTRATIVE LAW
2001 OAL Determination No. 1
February 7, 2001**

Requested by:

LENZIE L. JACKSON

Concerning:

CALIFORNIA DEPARTMENT OF CORRECTIONS RULE CONCERNING CUSTODY CREDIT AWARDED TO PRISONERS RESENTENCED PURSUANT TO *PEOPLE V. ROMERO*

Determination issued pursuant to Government Code Section 11340.5; California Code of Regulations, Title 1, Section 121 et seq.

ISSUE

Does a rule contained in an instructional memorandum utilized by the California Department of Corrections concerning computation of custody credits for inmates resentenced pursuant to *People v. Romero* constitute a "regulation" as defined in Government Code section 11342.600, which is required to be

adopted pursuant to the Administrative Procedure Act (Gov. Code, div. 3, tit. 2, ch. 3.5, sec. 11340 et seq.; hereafter, "APA")? ¹

CONCLUSION

A rule contained in an instructional memorandum utilized by the California Department of Corrections ("Department") concerning computation of custody credits for inmates resentenced pursuant to *People v. Romero* constitutes a "regulation" as defined in Government Code section 11342.600, and is required to be adopted and codified pursuant to the rulemaking procedures of the APA.

BACKGROUND AND ANALYSIS

On September 7, 1995, the requester, Lenzie Jackson, was sentenced to 25 years to life under Penal Code section 667, subdivisions (b)–(i) and section 1170.12 (Three Strikes law) following a conviction for sale of marijuana. Less than one year later, the California Supreme Court decided *People v. Romero* (1996) 13 Cal.4th 497, 53 Cal.Rptr. 2d 789. The Court held that a trial judge on his or her own motion had the power "to strike prior felony conviction allegations in cases brought under the Three Strikes law." (13 Cal.4th at 529–30, 53 Cal.Rptr. at 808.) Following *Romero*, many inmates of the Department sentenced under the Three Strikes law, including Mr. Jackson, sought reduction of their sentences.

On August 15, 1997, the Sacramento County Superior Court struck one of Jackson's two prior felony convictions pursuant to *Romero*. This meant he was now a "two striker," and he was, accordingly, resentenced to a term of eight years in state prison pursuant to Penal Code section 667, subdivision (e)(1). The Superior Court noted that post sentence conduct and work credits were to be determined by the Department. ²

Mr. Jackson subsequently submitted an inquiry to the Department, claiming that he had not received credit for all the time that he had spent in the custody of the Department. The Department informed Mr. Jackson that he had already received all custody credits to which he was entitled ³ and was advised that

the Department had made its determination "[p]er the Instructional Memorandum, CR/96/27." ⁴ Memorandum CR/96/27 outlines the procedure to be followed when an inmate is resentenced pursuant to *Romero*. In his request for determination, Mr. Jackson took issue with this memorandum, which provides in part as follows:

"Pursuant to PC Section 1170.12(a)(5), once the inmate has been physically placed in CDC the total amount of credit awarded shall not exceed one-fifth of the total term. By including CDC time in the actual time and calculating conduct credits on the CDC time at a rate greater than one-fifth, the court has granted excessive conduct credits.

"In an effort to alleviate this problem, cases resentenced pursuant to *People v. Romero* will be an exception to our policy regarding resentenced cases. . . . Do not change the term starts date, leave the original term starts date, original presentence and post sentence credits." [Emphasis in original.]

It is the provisions contained in the above instructional memorandum governing the "start date" and consequently credit given to inmates resentenced pursuant to *Romero* that are the subject of this regulatory determination.

A determination of whether the Department's rule is a "regulation" subject to the APA depends on (1) whether the APA is generally applicable to the quasi-legislative enactments of the Department, (2) whether the challenged rule is a "regulation" within the meaning of Government Code section, 11342.600, and (3) whether the challenged rule falls within any recognized exemption from APA requirements.

(1) As a general matter, all state agencies in the executive branch of government and not expressly or specifically exempted are required to comply with the rulemaking provisions of the APA when engaged in quasi-legislative activities. (*Winzler & Kelly v. Department of Industrial Relations* (1981) 121 Cal.App.3d 120, 126–128, 174 Cal.Rptr. 744, 746–747; Government Code secs. 11342.520 and 11346.) In this connection, the term "state agency" includes, for purposes applicable to the APA, "every state office, officer, department, division, bureau, board, and commission." (Government Code sec. 11000.) The Department is in neither the judicial nor legislative branch of state government, and therefore, unless expressly or specifically exempted therefrom, the APA rule-making requirements generally apply to the Department.

¹ This request for determination was filed by Lenzie L. Jackson, J-75322, California State Prison, Solano, Bldg. 15-N-1-L, P.O. Box 4000, Vacaville, CA 95696-4000. The California Department of Corrections' response was filed by John H. Sugiyama, Deputy Director, Legal Affairs Division, Department of Corrections, P.O. Box 942883, Sacramento, CA 94283-0001. This request was given a file number of 99-021. This determination may be cited as "2001 OAL Determination No. 1."

² See nunc pro tunc order of the Superior Court, dated Dec. 31, 1998, attached as Exhibit D1 to request for determination.

³ Memorandum dated April 1, 1999, p. 1.

⁴ Memorandum from A. C. Newland, Warden of State prison at Vacaville dated May 13, 1999.

In addition, Penal Code section 5058, subdivision (a), declares in part as follows:

“The director [of the Department of Corrections] may prescribe and amend rules and regulations for the administration of the prisons. . . . The rules and regulations *shall be promulgated and filed pursuant to [the APA]* [Emphasis added.]”

OAL concludes that APA rulemaking requirements generally apply to the Department. (See *Poschman v. Dumke* (1973) 31 Cal.App.3d 932, 942, 107 Cal.Rptr. 596, 603 (agency created by Legislature is subject to and must comply with APA).)

(2) Government Code section 11340.5, subdivision (a), prohibits state agencies from issuing rules without complying with the APA. It states as follows:

“(a) No state agency shall issue, utilize, enforce, or attempt to enforce *any* guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule, which is a [‘regulation’] as defined in Section 11342.600, *unless* the guideline, criterion, bulletin, manual, instruction, order, standard of general application or other rule has been adopted as a regulation and filed with the Secretary of State pursuant to [the APA]. [Emphasis added.]”

Government Code section 11342.600, defines “regulation” as follows:

“. . . every rule, regulation, order, or standard of general application *or* the amendment, supplement, or revision of any rule, regulation, order, or standard adopted by *any* state agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure. . . . [Emphasis added.]”

According to *Engelmann v. State Board of Education* (1991) 2 Cal.App.4th 47, 62, 3 Cal.Rptr.2d 264, 274–275, agencies need not adopt as regulations those rules contained in a “statutory scheme which the Legislature has [already] established” But “to the extent [that] any of the [agency rules] depart from, or embellish upon, express statutory authorization and language, the [agency] will need to promulgate regulations. . . .” (*Ibid.*)

Under Government Code section 11342.600, a rule is a “regulation” for these purposes if (1) the challenged rule is *either* a rule or standard of general application *or* a modification or supplement to such a rule and (2) the challenged rule has been adopted by the agency to *either* implement, interpret, or make specific the law enforced or administered by the agency, *or* govern the agency’s procedure. (See *Grier*

v. Kizer (1990) 219 Cal.App.3d 422, 440, 268 Cal.Rptr. 244, 251; *Union of American Physicians & Dentists v. Kizer* (1990) 223 Cal.App.3d 490, 497, 272 Cal.Rptr. 886, 890.)

In this analysis, we are guided by the California Court of Appeal in *Grier v. Kizer, supra*:

“[B]ecause the Legislature adopted the APA to give interested persons the opportunity to provide input on proposed regulatory action (*Armistead, . . . 22 Cal.3d at p. 204, 149 Cal.Rptr. 1, 583 P.2d 744*), we are of the view that *any doubt as to the applicability of the APA’s requirements should be resolved in favor of the APA.* [Emphasis added.]” (219 Cal.App.3d at 438, 268 Cal.Rptr. at 253. ⁵)

The Department’s Instructional Memoranda

The Department maintains that the memorandum in question merely discusses situations where a trial court modifies the award of presentence credits after resentencing an inmate in light of the *Romero* opinion and impacts only a small percentage of inmates “resentenced in light of that opinion.” ⁶

Even though the number of persons in a class may be small, this does not negate the existence of a general rule. For an agency policy to be a “standard of general application,” it need not apply to all citizens of the state. It is sufficient if the rule applies to all members of a class, kind, or order. (*Roth v. Department of Veteran Affairs* (1980) 110 Cal.App.3d 622, 630, 167 Cal.Rptr. 552, 556. See *Faulkner v. California Toll Bridge Authority* (1953) 40 Cal.2d 317, 323–324 (standard of general application applies to all members of any open class); *Tidewater Marine Western, Inc. v. Bradshaw* (1996) 14 Cal.4th 557, 571, 59 Cal.Rptr.2d 186, 194 (In order for the APA to be applicable to a rule, “the agency must intend its rule to apply generally, rather than in a specific case [A] rule applies generally so long as it declares how a certain class of cases will be decided.”).)

The Department also maintains that the memorandum in question was designed to fit a “*particular set of circumstances*” created by the *Romero* opinion. (Emphasis added.) ⁷

This “particular set of circumstances,” however, is not necessarily the same as a case-specific application. It involves a class of inmates, not just a specific inmate. Moreover, virtually all regulations adopted by state agencies apply to particular situations and particular groups of people.

⁵ OAL notes that a 1996 California Supreme Court case stated that it “disapproved” of *Grier* in part. *Tidewater Marine Western, Inc. v. Bradshaw* (1996) 14 Cal.4th 557, 577, 59 Cal.Rptr. 2d 186, 198. *Grier*, however, is still good law for these purposes.

⁶ Department’s response, p. 2.

⁷ *Id.*, p. 2.

In this regard, *Taye v. Coye* (1994) 29 Cal.App.4th 1339, 35 Cal.Rptr.2d 27, relied on by the Department, is distinguishable. It involved the application of a rule to a specific case and not a class of individuals. The court noted as follows:

“The auditing method used by LaPlaunt here, in contrast, was not a standard of general application used in all Medi-Cal cases. Thus, LaPlaunt declared: ‘The audit procedures used to conduct the audit of Pride Home Care Medical *were designed to fit the particular conditions that were encountered upon the arrival at the audit site.*’” (29 Cal.App.4th at 1345, 35 Cal.Rptr.2d at 31 [Emphasis added].)

The Department further maintains that it is doing nothing more than issuing directives concerning the *Romero* opinion. As support for this position, it relies on *Aguilar v. Association for Retarded Citizens* (1991) 234 Cal.App.3d 21, 285 Cal.Rptr. 515 in which the court found that the interpretation by the Division of Labor Standards Enforcement (DLSE) of a wage order issued by the Industrial Welfare Commission did not constitute a regulation that was subject to the APA. The Department maintains that like the DLSE, it provides staff with assistance in dealing with orders from an outside entity.⁸

Aguilar relied on *Skyline Homes, Inc. v. Department of Industrial Relations*, 165 Cal.App.3d 239, 211 Cal.Rptr. 792 in its holding that interpretations of wage orders by the DLSE are not regulations subject to the APA. *Skyline Homes*, however, has been disapproved by the California Supreme Court on precisely the same ground. In *Tidewater Marine Western, Inc. v. Bradshaw* (1996) 14 Cal.4th 557, 59 Cal.Rptr.2d 186, the Supreme Court stated as follows:

“The policy for calculating overtime pay at issue in *Skyline Homes* was a regulation within the meaning of the APA because it was a standard of general application interpreting the law the DLSE enforced and because it was not merely a restatement of prior agency decisions or advice letters. *We acknowledge that the employer challenged the policy in the context of a particular adjudication, but this fact does not alter its character as a policy of general application and thus a regulation.* We disapprove *Skyline Homes* to the extent that it concludes otherwise.” (14 Cal.4th at 573, 59 Cal.Rptr.2d at 196 [Emphasis added].)

Thus, to the extent that *Aguilar* held that interpretive rules need not be adopted pursuant to the APA, even in case specific situations, it is at odds with *Tidewater* and, thus, not determinative of this issue.

Additionally, the Supreme Court went on to hold in *Tidewater* as follows:

“The policy at issue in this case was expressly intended as a rule of general application to guide deputy labor commissioners on the applicability of IWC wage orders to a particular type of employment. In addition, the policy interprets the law that the DLSE enforces *by determining the scope of the IWC wage orders.* . . . Accordingly, the DLSE’s enforcement policy appears to be a regulation within the meaning of Government Code section 11342, subdivision (g).” (14 Cal.4th at 572, 59 Cal.Rptr.2d at 195 [Emphasis added].)

For these reasons, we conclude that the rule enunciated in Department memorandum CR/96/27 is one of general application.

The key issue for this determination is whether the Department’s policy is merely a restatement of current law or whether it further implements or interprets the law governing the manner in which an inmate’s sentencing time is computed.

The Department states that the memorandum in question was designed to make staff aware that some inmates committed to state prison pursuant to the Three Strikes law may be resentenced in light of the *Romero* opinion but does not interpret or implement *Romero*. The Department maintains that the memorandum is not regulatory, but is merely designed to instruct staff on the appropriate method to process court orders issued pursuant to the *Romero* case.⁹

The manner in which the Department characterizes its memorandum, however, is not dispositive. *State Water Resources Control Board v. Office of Administrative Law (Bay Planning Commission)* (1993), made clear that reviewing authorities are to focus on the *content* of the challenged agency rule, not the *label* placed on the rule by the agency:

“. . . [The] Government Code . . . [is] careful to provide OAL authority over regulatory measures whether or not they are designated ‘regulations’ by the relevant agency. In other words, *if it looks like a regulation, reads like a regulation, and acts like a regulation, it will be treated as a regulation whether or not the agency in question so labeled it.* . . . [Emphasis added.]” (1993) 12 Cal.App.4th 697, 702, 16 Cal.Rptr.2d 25, 28.

With respect to whether a rule of general application is meant to implement, interpret, or make specific a law, or other regulation, in *Union of American Physicians & Dentists v. Kizer* (1990), the agency argued that its documentation requirements were not

⁸ *Id.*, p. 2.

⁹ *Id.*, pp. 1–2.

subject to the APA because they “were ‘simply informational in nature and [did] not seek to substantially regulate behavior.’” The California Court of Appeal rejected this argument, noting that agency rules that do no more than implement, interpret, and make specific the law enforced or administered by the agency require the promulgating agency to comply with the APA. (223 Cal.App.3d at 502, 272 Cal.Rptr. at 892.)

In order to understand whether the Memorandum CR/96/27 implements, interprets, or makes specific the law, some discussion of the underlying legal principles governing sentencing credits is necessary. In this connection, persons convicted of felonies frequently spend time in local jails prior to being sentenced to state prison and are entitled to “presentence” credit for this time as well as for “behavior” and “worktime” credits, specified in Penal Code section 4019, that they would have been entitled to while in prison (see Pen. Code secs. 2900.5 (a) and 4019; *People v. Chew* (1985) 172 Cal.App.3d 45, 48, 217 Cal.Rptr. 805). In other words, a prisoner who serves presentence time in a county jail is entitled to receive credit for both the actual days served and additional conduct behavior and worktime credit.

When a prisoner becomes an inmate in the state prison system, he or she may also be eligible for conduct and worktime credits. But these *postsentence* credits are calculated using different formulae. (See Penal Code secs. 2930–2935.) Credits for inmates receiving sentences under the Three Strikes law, however, are significantly curtailed. As a general matter, the total amount of credits awarded may not exceed one-fifth of the total term of imprisonment imposed and do not accrue until the defendant is physically placed in the state prison. (See Pen. Code sec. 1170.12(a)(5)).

Matters become more complex when an inmate’s original sentence is set aside or modified *after* he or she has served part of it in state prison. The general rule, as discussed in *People v. Chew*, *supra*, 172 Cal.App.3d 45, 217 Cal.Rptr. 805, is that credit should be based on actual days served. As stated by the court: “. . . time spent in prison between the initial sentencing and resentencing or a new sentence is properly characterized as presentence time. Defendant is entitled to credit for the prison time as if no appeal had been taken.” (172 Cal.App.3d at 47, 217 Cal.Rptr. at 806.)

Thus, the issue in Mr. Jackson’s case is whether credits awarded to him were in the nature of presentence or postsentence credits. In *People v. Hill* (1995) 37 Cal.App.4th 220, 44 Cal.Rptr.2d 11, at issue was whether *postsentence* credit limitations imposed

by the Three Strikes law also applied to presentencing credits. The court held that they did not. It noted as follows:

“[S]ubdivision (c)(5) of section 667 [of the Penal Code] limits prison credit; we must now determine whether it eliminates presentence conduct credit. The subdivision provides: ‘the total amount of credits awarded pursuant to Article 2.5 . . . shall not exceed one-fifth of the total term of imprisonment imposed and shall not accrue until the defendant is physically placed in the state prison.’ Article 2.5 . . . provides for prison credit on a term of imprisonment. *It does not include presentence conduct credit, which is governed by sections 2900.5 and 4019.* Defendant contends that since there is no reference to presentence conduct credit in subdivision (c)(5) of section 667, there was no change in existing law and he is entitled to such credit for the period he spent in jail. He is correct.” (37 Cal.App.4th at 224, 44 Cal.Rptr.2d at 12 [Emphasis added]. *Accord*, *People v. Thomas* (1999) 90 Cal.Rptr.2d 642, 644; *People v. Caceres* (1997) 52 Cal.App.4th 106, 110, 60 Cal.Rptr.2d 415, 417.)¹⁰

When Mr. Jackson was resentenced, the trial court awarded him credits under sections 2900.5 and 4019 for prior time spent in the county jail as well as credit for the time he previously spent under his original sentence in the custody of the Department. All of this was predicated on the *prospective* execution of the new sentence.

In this respect, the trial court noted as follows:

“At the August 15 resentencing, the court did not calculate the time credits of Mr. Jackson. The court chose to order the new sentence to be Nunc Pro Tunc to the date of the original sentencing. The court assumed the Department of Corrections would then recalculate the time credits, since Mr. Jackson had been in the custody of the Department since September of 1995, except for a period of a few days.

However, it now appears that the better procedure is for the trial court to calculate the presentence credits as of the date of resentencing, August 15, 1997.” (Abstract of Judgment, attached as Exhibit D1 to request for determination.)

This ruling appears consistent with the principle that it is the province of the court to calculate presentence time and conduct credits, and the province of the Department to calculate conduct and work credits

¹⁰ Section 667, subdivision (c) of the Penal Code, the legislative version, is virtually identical to section 1170.12, subdivision (a), the initiative measure.

for the time the inmate is in its custody. (Penal Code section 2900.5; *People v. Chew*, *supra*, 171 Cal.App.3d at 47, 217 Cal.Rptr. at 806; *People v. Robinson* (1994) 25 Cal.App.4th 1256, 1257–58, 31 Cal.Rptr.2d 445, 446–47; *People v. Thornburg* (1999) 65 Cal.App.4th 1173, 1175–76, 77 Cal.Rptr.2d 288, 289.)

Mr. Jackson maintains, however, that the Department used the wrong start date for purposes of his resentencing. He claims it should have been August 22, 1997, the date he began serving his new sentence, not September 19, 1995, the date of his original imprisonment. In this respect, Mr. Jackson argues that the Department's Instructional Memorandum CR/96/27 incorrectly applies the law under *Romero* because it requires the use of the original sentencing date when an inmate is resentenced rather than the date of resentencing. Because a determination by OAL, pursuant to Government Code section 11340.5, is limited to whether or not an uncodified agency rule meets the definition of "regulation" as provided in Government Code section 11342.600, we do not consider in this determination whether or not the Department correctly calculated Mr. Jackson's resentencing in accordance with the law.

However, as pointed out above, the Department's Memorandum CR/96/27 does instruct that, with respect to resentencing cases under *Romero*, "[d]o not change the term starts date, leave the original term starts date, original presentence and post sentence credits." The Department indicated in that memorandum that this method of calculation was necessary to alleviate excess credits granted by the court by including Department time at a rate greater than the one-fifth rate provided for in Penal Code section 1170.12(a)(5).

We think the procedure established by the Department to retain the original sentence date in *Romero* situations, whether consistent with the law or not, implements, interprets, or makes specific the law with respect to the calculation of credits. (See *Engelmann v. State Bd. of Education*, 2 Cal.App.4th at 62, 3 Cal.Rptr.2d at 275.) Thus, we conclude that the policy employed by the Department is a "regulation" and is subject to the APA unless expressly exempted by statute.

The Temporary Nature of the Rule in Question

The Department maintains that the memorandum in question was designed to deal with a short-term issue created by a judicial opinion and was not designed to announce the promulgation of permanent CDC policy.¹¹

Despite the fact that the Department may no longer be applying this instructional memorandum for resentencing cases which may arise in the future, applicability of the APA does not depend on the duration of the rule in question. Government Code section 11342.600, defines in part the term "regulation" as ". . . every rule, regulation, order, or standard of general application." (Emphasis added.) No minimum time requirements are included in this definition. If it were, state agencies could circumvent the APA by adopting a series of short-term underground regulations, each with a limited duration.

In addition, nothing in the Department's response suggests that the rule in question is now moot. In fact, just the opposite appears to be the case. The Department in computing Mr. Jackson's new sentence applied Instructional Memorandum CR/96/27. A May 13, 1999 memorandum written by the Warden of the State Prison at Vacaville to Mr. Jackson states in part as follows:

"Per the Instructional Memorandum, CR/96/27, we have retained your original received date of September 19, 1995, with a term of 8 years, and with 72 days PC2900.5 credits, 36 days PC4019 credits and 11 days of post sentence credits."

Lack of Authority

The Department states that it is not responsible for the enforcement or administration of either the *Romero* opinion or the Three Strikes law.¹² Presumably, the implication of this argument is that since the Department has no authority to enforce certain laws, it could not have adopted rules that are underground regulations.

The *Romero* opinion gave the courts the authority to resentence certain classes of inmates. But, the authority to resentence is not the issue with which this determination is concerned. Rather, it is the policy enunciated in the memorandum in question relating to the manner of calculating presentence credits for inmates who have already been resentenced pursuant to *Romero* that is the issue.

Even if the Department lacks the "legal capacity" to issue or enforce a particular rule, this does not mean it cannot *in fact* do so. The test for the existence of a "regulation" is not whether there is sufficient authority or legal capacity, but rather the "effect and impact on the public" of the agency action. (Emphasis added.) (*Winzler & Kelly v. Dept. of Industrial Relations* (1981) 121 Cal.App.3d at 127, 174 Cal.Rptr. at 744.)

- (3) With respect to whether the Department's rules fall within any recognized exemption from APA requirements, generally, all "regulations" issued

¹¹ Department's response, p. 2.

¹² *Id.*, p. 1.

by state agencies are required to be adopted pursuant to the APA, unless *expressly* exempted by statute. (Government Code section 11346; *United Systems of Arkansas v. Stamison* (1998) 63 Cal.App.4th 1001, 1010, 74 Cal.Rptr.2d 407, 411 (“*When the Legislature has intended to exempt regulations from the APA, it has done so by clear, unequivocal language.*” [Emphasis added.])¹³

The Department does not contend that any *express* statutory exemption applies. Our independent research having also disclosed no express statutory exemption, we conclude that none applies.

Therefore, we conclude that a rule contained in an instructional memorandum utilized by the California

Department of Corrections concerning computation of custody credits for inmates resentenced pursuant to *People v. Romero* constitutes a “regulation” as defined in Government Code section 11342.600, and is required to be adopted and codified pursuant to the rulemaking procedures of the APA.

DATE: February 7, 2001

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¹³ The rules at issue in *Stamison* were subsequently expressly exempted from the APA by statute. (See Stats. 1998, ch. 731, § 1, p. 3889, codified at Gov. Code § 14615.1.)

